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In The

Supreme Court of the United States

October 1965 Term

No. 1019

ALMA M. GREEN and HARRY GREEN, PETITIONERS

V.

OSGOOD-LEWIS-PERKINS, INC., RESPONDENTS

Petition for Writ of Certiorari to the Supreme Court of Nebraska and the District Court of Richardson County, Nebraska

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Petition for Writ of Certiorari to the Supreme Court of Nebraska and the District Court of Richardson County, Nebraska

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Come now petitioners and respectfully petition this Honorable Court to grant a writ of certiorari to the Supreme Court of Nebraska, the Appellate Court, and the District Court of Richardson County, Nebraska, the Trial Court, to review the judgment and decree entered in the trial court on March 3, 1964 and affirmed as modified in the Supreme Court of Nebraska on October 1, 1965 and order overruling motion for rehearing on November 15, 1965, and allege, aver, and complain pursuant to Rules 19, 21, 22 and 23 of this Court, in the following particulars:

A. Reference to official and unofficial reports of opinions delivered in the courts below.

The decision and opinion of the Supreme Court of Nebraska filed on June 11, 1965, in the case of *Osgood-*

Lewis-Perkins, Inc., v. *Alma M. Green, et al.*, is reported in official Nebraska Reports at 178 Neb. 807, 135 N. W. 2d 718, and decision and opinion filed on October 1, 1965, overruling motion for rehearing is reported in 179 Neb. 133, (not rep. N. W. 2d, 48 S.C.J. 133 local publication) by which original decision and opinion was modified wherein the title to the accretion land was quieted in respondent; both of which decisions and opinions are appended by reference to the transcript which includes same duly certified to by the Clerk of the Supreme Court of Nebraska and in the appendix hereto.

B. Jurisdictional grounds.

The following is a concise statement of the grounds on which the jurisdiction of the Court is invoked showing:

1. The District Court of Richardson County, Nebraska, received into evidence and erroneously determined and decreed on federal question adopted for basis of its said decision and decree in said court, Exhibit 56, introduced in the trial court, which is an incomplete survey of Indian land described as Lot 3 below, by General Land Office of the Department of Interior approved February, 1928, and completed by John S. Knowles September, 1927, of the alleged accretion land in Section 25, Township 1 North, Range 19 East of the 6th P.M., and Lot 3, Section 36, Township 1 North, Range 18 East of the 6th P.M., all located in Richardson County, Nebraska, of the accretive area that was shown to be in existence on November 24, 1928, by Exhibit 111, the Corps of Engineers' Map, when such Exhibit 56 showed that the accretive land stopped in the old slough east thereof, and it was an actual fact

that there was accretion land at such time extending east of said old slough ceasing only at or about 4,000 feet from the monument at southeast corner of Lot 1, Section 31, Township 1 North, Range 19 East of the 6th P.M., and the trial court received into evidence and accepted and erroneously determined and decreed on a federal question and adopted as res judicata the United States District Court of Nebraska, Lincoln Division, decree, Exhibit 94, dated May 18, 1929, approving said survey of said Indian land of September, 1927, and is shown in Exhibit 56, all shown in appendix hereto.

Said action in which said judgment and decree was entered, was instituted by the United States of America against Rosa Nuzum and Rosa Nuzum, administratrix, Blanche N. Davis, Carl Davis, Georgia N. Zimmerman and George Zimmerman, Fred Nuzum and William Ogden to quiet title in plaintiff to Lot 3, Section 36, Township 1, North, Range 18 East of the 6th P.M., Richardson County, Nebraska. In fact, said September, 1927, Indian Land Survey was made especially and specifically for use in evidence to support said decree entered May 18, 1929, and all of the above findings and decree of said District Court was accepted and approved and affirmed by the Supreme Court of Nebraska in its decision and opinion of June 11, 1965, determining that petitioners had no right, title, interest or claim to any of said accretion land located in the S½ S½ Sections 31 and 32, Township 1, North, Range 19 East of the 6th P.M., Richardson County, Nebraska.

2. The said District Court in its decree and the Supreme Court of Nebraska in its final decision and opinion on Oct. 1, 1965 quieted title to said accretion land located in said S½ S½ Sections 31 and 32, Township 1, North, Range 19 East of the 6th P.M., in res-

pondents against petitioners, erroneously found and ordered on a federal question that such Sept., 1927, Survey of Indian Land of Lot 3, Section 36, Township 1, North, Range 18 East of the 6th P.M., was a completed survey of accretion land and that said decree of federal court on May 18, 1929, was res judicata against appellants and authorized the quieting of title all of said accretion land in appellees Osgood-Lewis-Perkins, Inc.

3. The said District Court in its decree and the Supreme Court of Nebraska in its final decision and opinion of Oct. 1, 1965 and overruling petitioners' motion for rehearing on November 15, 1965, affirming said trial court's decree of quieting title to all of said accretion land in said S½ S½ Section 31 and 32, Township 1, North, Range 19 East of the 6th P.M., in appellees Osgood-Lewis-Perkins, Inc., erroneously found and decreed a federal question that the last complete meander line established in the GLO Survey of 1890, Exhibit 55, and Thalweg Survey of 1890, of the Missouri River Commission, Exhibit 92, of the high west bank of the Missouri could not be used as the basis for the measurement of the accretion land attached to the riparian land owned by petitioner Alma M. Green in the State of Kansas described as all that accretion land to that part of Lots 1 and 2, Section 6, Township 1 South, and Lots 1 and 2, Section 5, Township 1, South, Range 19 East of the 6th P.M., in Doniphan County, Kansas.

4. The said District Court in its decree on March 15, 1964, and overruling motion for new trial on April 23, 1964, and Supreme Court of Nebraska, in its final decision and opinion on November 15, 1965, overruling appellants' motion for rehearing on reaffirming its findings and decree of October 1, 1965, which affirmed

said District Court's decree on March 5, 1964, which was not changed in overruling appellants' motion for new trial on April 23, 1964, said District Court decree having found and ordered (a) that petitioners had disclaimed all right, title and interest to land west of the Old Slough that extended across the west half of said Section 31 in general north and south direction and (b) C. B. & Q. R.R. Co. interest in right of way prior to January 23, 1934, was lessee and same was not owner and same was not riparian and its conveyance to Richardson County, Nebraska, didn't convey any riparian rights to any real estate in question and (c) appellant Alma M. Green didn't establish title to Kansas accretion land described in Case No. 8968 in the District Court of Doniphan County, Kansas, entitled *Alma M. Green* v. *John T. Ector, et al.*, as recorded in Doniphan County, Kansas, and affirmed by Supreme Court of Kansas by using the apportional method of allocating accretion land and petitioner(s) Alma M. Green failed to establish title to said lands in Section 31 and 32, Township 1, North, Range 19 East of the 6th P.M. by adverse possession, but that equity required that all accretion land therein must be allocated by extending the Kansas Nebraska State Line and existing Section Lines eastward to the thread of the Missouri River and attaching the accretion land as now formed to the Nebraska riparian owner and as determined by extended lines to respondent in fee simple and a title thereto quieted in respondent Osgood-Lewis-Perkins, Inc. against petitioner Green.

5. The said District Court in its decree on March 5, 1964, and overruling motion for new trial of appellants on April 23, 1964, and the Supreme Court of Nebraska, in its final decision and opinion on November 5, 1965, overruling motion for rehearing in reaffirming the find-

ings and decree of October 1, 1965, modifying its decision and opinion of June 11, 1964, affirming said District Court's decree of March 5, 1964, actually erroneously decreed on a federal question that petitioner Alma M. Green, owner of riparian land on high west bank of the Missouri could not claim and have allocated to her accretion land that was attached to her said riparian land that extended across the Kansas-Nebraska boundary line to the west bank of the Missouri River based on the last meander line along the west bank of the Missouri as established in the G.L.O. Survey of 1890 and the Thalweg Survey of 1890 by the Missouri River Commission.

B. (i) (ii) Dates of judgments and decrees sought to be reviewed and of rehearings and stay of mandate to permit filing of petition.

Decree of trial court of March 5, 1964, judgment of Supreme Court of Nebraska on June 11, 1964 and judgment of modification in overruling motion for rehearing on October 1, 1965 and order overruling motion for rehearing on Nov. 15, 1965 and order staying mandate for ninety days until Febr. 15, 1966; all shown in appendix hereto.

C. Questions presented for review.

(1) The question whether or not a new, incomplete resurvey, a meander line established on February 28, 1928, of Lot 3, Section 36, and actually was only a retracement and reestablishment of lines of the G.L.O. Survey of 1890 which was used as a basis of quiet title action in United States District Court on May 18, 1929, can be used in preference to the original G.L.O. Survey of 1890 and the Thalweg Survey of 1890 by the Missouri

River Commission which established the meander line of the west bank of the Missouri River at the same location but fixed south line of the accretion to be Kansas-Nebraska boundary line rather than at Thalweg Survey of 1890 south line, along riparian land of appellants, all contrary to Title 43, U.S.C.A. p. 107, Section 772, presents a federal question reviewable by petition for writ of certiorari in the Supreme Court of the United States.

(2) A federal decree held to be res judicata in a state court suit raises a federal question reversible in the Supreme Court of the United States. Appellee pleaded all land lying east of the old C. B. & Q. R.R. Co. right of way was formed by accretion at dates unknown to appellee and it was in existence and acquired by appellee's predecessors in title by mesne conveyances and appellee claims title by purchase and adverse possession and offered into evidence Exhibit 56, the incomplete survey of February 28, 1929, as new and resurvey of Indian land Survey made under special instruction on request from the Department of Interior for the purpose of prosecuting and taking a decree in the Case No. 439 Law, entitled *United States* v. *Rosa Nuzum,* Lincoln Division of the United States District Court to quiet title to Lot 3, Section 36, Township 1, North, Range 18 East of the 6th P.M., Richardson County, Nebraska, herein Exhibit 94 and Exhibit 98 contained comment "as to the completeness of the survey there may be some question, regarding advisability of restoring all missing corners on the boundaries of Section 36 and within its subdivisions and also the extension of the east range line; however, it seems that the original Lot 3 with its accretions have been accurately fixed on the ground and for this reason the survey fully serves the purpose for which it was intended."

(3) A question of whether accretion land that is attached to riparian land located on the high west bank owned by appellant can be extended across the Kansas-Nebraska boundary to the Missouri River is federal question and may be brought to the United States Supreme Court by petition for writ of certiorari.

(4) The question of whether or not the pleaded judgment and decree of *Green* v. *Ector, et al.,* in the District Court of Doniphan County, Kansas and affirmed in the Supreme Court of Kansas, quieting title of the accretion land in appellant Alma M. Green, lying immediately south of the Kansas Nebraska boundary and lying east of the old C. B. & Q. R.R. Co. right of way not a Kansas highway, should have been given full faith and credit in Nebraska, under Title 28 U.S.C.A., Section ___ presents a federal question reviewable on petition for writ of certiorari in the Supreme Court of the United States.

(5) The question of whether or not a 100-foot strip of land granted to the predecessor in title of C. B. & Q. R.R. Co. was only an easement or a fee under and pursuant to such grant from the United States and whether a fee title was conveyed to Richardson County, Nebraska, rather than an easement and whether said strip of land was riparian to said accretion land rather than to land of appellee.

D. Statutes and acts of congress involved and citations thereof.

The Acts of Congress which this case involves are as follows:

(1) Title 43 U.S.C.A., p. 107, Section 772, it is provided:

"The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made, as he may deem wise under the rectangular system on that date provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: *Provided,* That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entry man, or owner of lands affected by such resurvey or retracement: *Provided further,* That not to exceed 20 per cent of the total annual appropriation for surveys and resurveys of the public lands shall be used for the resurveys and retracements authorized hereby. Mar. 3, 1909, C. 271, 35 Stat. 845; June 25, 1910, No. 40, 36 Stat. 884."

(2) Title 28 U.S.C.A., p. 505, Section 1738, which provides:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

(3) Title 43 U.S.C.A., p. 222, Section 913, provides:

> "All railroad companies to which grants for rights of way through the public lands have been made by Congress, or their successors in interest or assigns, are authorized to convey to any State, County, or municipality any portion of such right of way to be used as a public highway or street: Provided, That no such conveyance shall have the effect to diminish the right of way of such railroad company to a less width than 50 feet on each side of the center of the main track of the railroad as now established and maintained. May 25, 1920, c. 197, 41 Stat. 621."

E. Statement of case and facts material on questions presented.

Appellee in its amended petition alleged that all of the south half of the south half of Section 31 and all of that part of the south half of the south half and of the south half of the north half is Section 32, Township 1, North, Range 19 East of the 6th P.M., lying west of the center of the channel of the Missouri River, lying east of C. B. & Q. R.R. Co. right of way was formed by accretion at dates unknown to appellee and was in existence and acquired by appellee in its predecessors in title by mesne conveyances and appellee claims title by purchase and adverse possession. In the amended separate answer and cross-petition of appellants Green admitted that all of land lying east of highway No. 7 (the old C. B. & Q. R.R. Co. right of way) is land formed by accretion commencing subsequent to 1891, when the Missouri River receded and moved imperceptibly its main channel to east and north and south and left behind dry land above the high water mark, and by 1917 to 1923, said accretion land extended to a point about where the main channel of the Missouri River is

now flowing with slight variation and has particularly been stable since 1952 by closing the dams on the upper reaches of the Missouri River, appellants alleged was the owner in fee simple to all accretion land to that part of Lots 1 and 2 in Section 6 and Lot 2 of Section 5, all in Township 1, South, Range 19 East of the 6th P.M., in Doniphan County, being otherwise described as all of that land lying south of the Kansas-Nebraska Boundary and east of the C. B. & Q. R.R. Co. right of way and west of the Missouri River and north of Joseph White Estate land and alleged that appellant Alma M. Green was owner in fee simple of the accretion land extending across Kansas-Nebraska Boundary to the Missouri River which was accretion land formed at the same time and manner that the above-described accretion land owned by appellant Alma M. Green in Kansas, all of which was accretion to her Kansas riparian land above described.

However, her claim to said accretion land being limited to all that lying east of the Old Slough or chute which extends along the east line of the survey by John S. Knowles, U. S. Surveyor, from August 30 to September 26, 1926, and approved by Commissioner of General Land Office on July 10, 1927, and also described same by metes and bounds description prepared after surface survey by Willis Brown, State Surveyor of Nebraska, and that appellants Green made no claim to land lying west of said slough or chute, except any portion that had been occupied by appellants and their predecessor in title by adverse possession. Appellants pleaded the judgment and decree in the case of *Green* v. *John T. Ector, et al.*, enter in the District Court of Doniphan County, Kansas, which was affirmed by the Supreme Court of Kansas and cited in 187 Kan. 240,

356 P. 2d 164, as res judicata and a complete bar and estoppel against appellee prosecuting this action to quiet title against appellants to any land described in said metes and bounds description, and alleged that William F. Perkins and Catherine O. Perkins where predecessor is claimed chain of title of the defendants in said case of *Green* v. *John T. Ector, et al.*, above cited and said Perkins joined with George M. Osgood in forming appellee corporation that eventually claimed acquisition of said accretion land and of which the Perkins owned one third of the stock of said appellee. Appellants also allege title to said accretion land described by said metes and bounds description by adverse possession for a period over 10 years. Appellee replied by alleging that appellee was a domesticated, foreign corporation, and that the law of the State of Kansas is that a riparian owner only owns the land on a navigable stream only to the river's margin and if the stream changes by accretion or reliction, the boundary between the land of the State and that of other proprietors follow the involvement of the river and made a general denial to appellants amended answer and cross-petition. By documentary evidence in the form of abstracts of title, and conveyances, appellee showed ownership to the Patented land alleged in its petition and similarly appellant Alma M. Green showed ownership to the Patented land by abstracts of title and conveyances and accretion thereto lying immediately south of the Kansas-Nebraska Boundary and lying east of C. B. & Q. R.R. Co. right of way, now Kansas highway No. 7, which was attached to said appellants patented land above described and showed by surface survey that the accretion land described above by the metes and bounds description prepared by Willis Brown, State Surveyor, was a continuation to said appellants riparian Kansas

land and extended to the water's edge on the west side of the Missouri River. The State Surveyor based his survey of said accretion and the north boundary line thereof on the GLO Survey of 1890 and Thalweg Survey of 1890 by the Missouri River Commission which established the meander line of the west bank of the Missouri River of which appellant Alma M. Green's Patented land was riparian and to which all of the accretion land that was attached land to which said accretion land lying east of the C. B. & Q. R.R. Co. right of way and south of Kansas-Nebraska Boundary, fee simple title was quieted in appellant Alma M. Green in said cited case of *Green* v. *John T. Ector, et al.*, above cited and as a result thereof appellant Alma M. Green claimed said accretion land in Nebraska as described in said metes and bounds description. Many other maps of the Corps of Engineers and Incomplete GLO Resurvey, Survey of July 20, 1927 of Lot 3, Section 36, Township 1, North, Range 18 East of the 6th P.M., were introduced as evidence as exhibits and the United States District Court judgment and decree entered on May 18, 1929, quieting title to said Lot 3 in the United States of America, on the basis of said July 20, 1928, GLO Resurvey made under special instructions and for the special purpose of prosecuting and taking said judgment and decree on May 18, 1929, and which resurvey was shown to be incomplete survey of all of the accretion land that had become attached to the above-described riparian land lying west of the meander line established by said GLO Survey of 1890 and the Thalweg Survey of 1890 by the Missouri River Commission. Also the old unofficial, incomplete Relf survey was offered into evidence on this area; the Relf survey of 1916 showed more accretion land than the GLO Resurvey of 1927, referred to as the Indian Land Survey which had its eastern boundary of accretion land to

be approximate position of the middle of the Old Slough or chute as it extends from north to south along said Lot 3, designated as the Indian Land. Both appellant and appellee introduced evidence extensively as to their respective adverse claims; however, even though Leonard Fee claims he occupied the accretion land east of the Old Slough lying east of said Lot 3, since sometime soon after 1941, the north half of the south half of said Sections 31 and 32, lying west of the River was not included in the quit claim deed of appellee; appellants claim to said accretion land included in said metes and bounds description did include the eastern portion of said north half of the south half of said Sections 31 and 32.

F. When federal questions were first raised in trial and appellate courts.

Appellant Alma M. Green pleaded in her answer and cross-petition that her claim was based on her ownership of said accretion land attached to her riparian patented land by her title having been quieted in said Kansas case of *Green* v. *Ector, et al.,* as shown by Exhibit 8; and that accretion land had continued across the Kansas-Nebraska boundary to the Missouri River and supported said allegations and contention by G.L.O. Survey of 1890 as shown by Exhibt 55, and said Thalweg Survey of 1890 by Missouri River Commission as shown by Exhibits 92 and 54 that established the meander line of 1890 and showed by surface survey and metes and bounds description of the accretion land in Exhibit 51 offered and received into evidence; said patent land was riparian to said claimed accretion land extending to the Missouri across the Kansas-Nebraska boundary as shown by said Exhibits 51, 54, 55 and 92. See Page 7-13 of certified copy of transcript.

In the assignments of error in the appeal from the trial court to the Supreme Court of Nebraska appellant contended in its brief, see page 27 of certified transcript, that the court erred in finding and ordering that C. B. & Q. R.R. Co., under Exhibits 20 and 21 was not riparian owner and the accretion thereto riparian to land of appellee and its predecessors in title and conveyance of right of way of said C. B. & Q. R.R. Co. did not convey riparian rights to Richardson County, Nebraska, and contended that the court erred in holding that the cited case of *Green* v. *Ector, et al.*, Exhibit 8, did not establish appellant Alma M. Green's fee simple title to said accretion land by using the proportionate method of allocating accretion land and that said judgment and decree was neither res judicata or stare decisis against appellee as to the accretion land that extended across the Kansas-Nebraska boundary.

In appellant's motion for rehearing and brief in support of same, see pages 40-42 of certified transcript, appellant contended the court had erred in following the authorities that had construed Sections 43 U.S.C.A., p. 107, Section 772, that U.S. G.L.O. Survey of 1890 and Thalweg Survey of 1890, Exhibits 55 and 92, must be used to establish meander lines by surveyors rather than subsequent incomplete resurveys and retracement of July 20, 1928 in measurement and division of accretion land among riparian owners and consider as res judicata the federal judgment and decree based on said fragmentary survey of 1928 made under special instructions and specifically for quieting title of said Lot 3 in the United States of America and include only a small part of the vast area of accretion and that the accretion land attached to the Kansas riparian land of appellant could not extend across the Kansas-Nebraska boundary to the Missouri River. The trial court determined that

said G.L.O. Resurvey of 1928 should be adopted to have established the meander line from shich to allocate the accretion land to riparian land from which point a surveyor must commence his survey to apportion accretion land among riparian owners and that Kansas-Nebraska boundary was the south line of appellee's portion of the accretion and that such conclusion defeated appellants' claim to any land as accretion to Kansas upland and that appellants were estopped to extend claim to the accretion land across such G.L.O. Resurvey and Retracement of 1928 as adopted was to be used as superseding the G.L.O. survey of 1890, Exhibit 55, and Thalweg Survey of 1890, Exhibit 92, and that said G.L.O. Resurvey and Retracement of 1928 having been used as a basis for the federal judgment and decree of May 18, 1929, in quieting title to said Lot 3 in Section 36 and the court held that said judgment and decree even though not res judicata against appellants same was in equitable barrier to the use of the meander line established in 1890 by G.L.O. Survey of 1890 and Thalweg Survey of 1890, see pages 30-39 in certified transcript filed herein. The holding of both trial court and Supreme Court of Nebraska was substantially the same since the Supreme Court of Nebraska affirmed the trial court in its decision and opinion in overruling petitioners motion for rehearing on October 1, 1965, see pages 34-39 of certified transcript filed herein.

G. Argument supporting reasons relied for allowance of writ.

(1) In support of petitioners contention pursuant to Rule 19 (1) (a) and Title 28 U.S.C.A., p. 88, Section 1257 providing that where a state court has decided a federal question of substance not therefore determined by the court or has decided it in a way probably not in

accord with applicable decisions of this court and in argument supplement to contended federal questions stated, petitioners respectfully submit to this court that the rule of law previously announced by this court in its construction of Title 43, U.S.C.A., p. 107, Section 772, should be as previously announced by the Supreme Court of Nebraska in *Hickman* v. *Jones,* (1921) 106 Neb. 466, 183 N. W. 980, and *Dancer* v. *Meyers,* (1929) 103 Neb. 856, 174 N.W. 845, both which construed the Act of Congress approved March 3, 1909, (35 U. S. St. at Large, p. 845, ch. 276) and amended June 25, 1910 (36 U. S. St. at Large, Resolution 40, p. 884) the latter mentioning it and the former only announcing the rule of construction of it held that the original surveys of public lands by United States Government on faith of which property rights have been acquired, control over surveys subsequently made by the government which affect such rights and a government resurvey authorized by Act of Congress for purpose of relocating and restoring lost or obliterated corners is evidence that the original corners are at the places relocated, but such evidence may be overturned by more convincing evidence that the original corners were in fact elsewhere. This court has announced the same rule in construing 43 U.S.C.A. p. 107, Section 772, in *Greene* v. *United States,* (La. 1921) 274 F. 145, affirmed, 43 S. Ct. 236, 260 U.S. 662, 67 L. Ed. 448, when it held that the unquestioned right of the government to make new surveys of public lands and correct errors in former ones does not make the new survey conclusive against a prior purchaser so as to prevent his assertion of whatever title he had acquired as against one claiming under the new survey. Other state court jurisdictions prior and subsequent to such decision of this court, have announced such rule on resurvey by the government. See

Bode v. *Rollwitz,* (1921) 60 Mont. 481, 199 P. 688; *Southern Pacific Land Co.* v. *Meserve,* (1921) 186 Cal. 157, 198 P. 1055; *Trustees of Internal Imp. Fund of State of Fla.* v. *Toffel,* (1962) 145 So. 2d 737; *Ben Realty Co.* v. *Gothberg,* (1941) 56 Wyo. 294, 109 P. 2d 455; *Ward* v. *Rodriguez,* (1939) 43 N. M. 191, 88 P. 2d 277, certiorari denied, 59 S. Ct. 837, 307 U.S. 627, 83 L. Ed. 1511; *Moscrip* v. *Webster lumber Co.,* (1925), 163 Minn. 471, 204 N. W. 326; *Marr* v. *Shroder,* (1960) 142 Colo. 106, 349 P. 2d 706; *Gardner* v. *Fort,* (1956) 72 Nev. 160, 298 P. 2d 468; *Bently* v. *Jenne,* (1925) 33 Wyo. 1, 236 P. 509; *Missouri Pac. R. Co.* v. *Sale,* (1939) 127 S. W. 2d 133, 197 Ark. 1111; In *Spanner* v. *Johnson,* (1892) 49 Kan. 788, 31 P. 664, the Kansas court held that a resurvey made after a patent is issued, cannot in the absence of fraud change the corners and boundaries as established by the original survey so as to affect the patentee's rights. In *United States* v. *State of Louisiana,* (1964) 229 F. Supp. 14, the court held that the Department of Interior does not have authority to determine ownership of land through surveys. In *Sioux City Bridge Co.* v. *Miller,* (Neb. 1926) 12 F. 2d 41, certiorari denied, 47 S. Ct. 112, 273 U.S. 723, 71 L. Ed. 859, held that a meander line merely shows water line at the time of survey and does not limit title to grantee thereto. To same effect is *Whitaker* v. *McBride,* (Neb. 1905) 25 S. Ct. 530 197 U.S. 510, 49 L. Ed. 857; *Jeffries* v. *East Omaha Land Co.* (Neb. 1890) 10 S. Ct. 518, 134 U.S. 178, 33 L. Ed. 872; *Jordan* v. *Hardin* (Ill. 1891) 11 S. Ct. 808, 140 U.S. 371, 35 L. Ed. 428. In *Thurlow* v. *Waite-Phillips Co.,* (Kan. 1927) 22 F. 2d 781, certiorari denied, 49 S. Ct. 8, 278 U.S. 598, 73 L. Ed. 528, the court held that a conveyance described in government patents as bounded by river bank carries accretions. We respectfully submit on

the above announced rules of law by this court construing Title 43 U.S.C.A., p. 107, Section 772, that Supreme Court committed prejudicial error when in its original judgment and opinion of June 11, 1965, see page 30-38, of certified transcript filed herein at page 32-36, it affirmed said trial court's decree, it said: "Under exceptional circumstances may in order to do equity, an incomplete meander line may be used as the old bank to be measured pursuant to the frontage-to-frontage method apportioning accretion among the landowners" and the court further said: "The exceptional facts in this case at bar impel us to adopt the 1927 meander line in Nebraska as the old bank to be measured under the frontage-to-frontage method approved in *Conkey* v. *Knudsen,* supra. Whether the 1929 judgment was erroneous, it is an equitable barrier to use of the 1890 line. Our conclusion defeats the defendants' claim to any land as accretion to Kansas uplands."

The announcement of such rule by the Supreme Court of Nebraska is not in accord and probably contrary to the rules of law above cited construing said Title 43 U.S.C.A., p. 107, Section 772, by this court and presents a federal question to be determined by this court by petition for writ of certiorari to the Supreme Court of Nebraska and the District Court of Richardson County, Nebraska.

(2) Further in support of petitioners' contention pursuant to said Rule 19 (1) (a) and Title 28 U.S.C.A., p. 88, Section 1257, and argument supplemental to contended federal question above stated, petitioners respectfully submit to this court that the rule of law decided and announced by the Supreme Court of Nebraska in affirming the trial court that the federal

court decree entered on May 18, 1929 in United States District Court of Nebraska, Lincoln Division, in using said resurvey and retracing of lines of approved G.L.O. Survey of February 22, 1928 by confession is a decision on a federal question of substance not hereto determined by this court or has decided it in a way probably not in accord with applicable decisions of this court when it said: "A prior judgment may be an operative fact, although rules res judicata are not applicable," and when said court further said: "A weighty factor in selecting an appropriate method of division is a prior action involving the Indian land. In 1929 the United States obtained a judgment by confession against defendants who are predecessors of present parties. In that case the court added to Lot 3 the accretion bounded on the north, south and east by the 1927 G.L.O. Survey lines. The judgment was entered in accordance with a plat of survey executed by the United States surveyor in 1927 and accepted by the Commissioner of the General Land Office. In the sketch of the eastermost 1927 U. S. G.L.O. line, which is located in Nebraska, represents the 1927 meander of the right bank. The 1929 judgment is not to be ignored, * * * a judgment may be an operative fact * * * although the rules of res judicata are not applicable. Restatement, Judgments, § 111, p. 527."

This court has previously announced the rule of law that the pleading of a federal decree as res judicata in a state court and introducing such federal judgment and decree into evidence in support of same, raises a federal question reviewable in this court by petition for writ of certioari and such rule is supported in *Toucey* v. *New York Life Ins. Co.,* Iowa & Mo., 62 S. Ct. 139, 314 U.S. 118, 86 L. Ed. 100, 137 A.L.R. 967; *Dupasseur* v. *Rochereau,* 21 Wall (U.S.) 130, 22 L. Ed. 588; *De-*

posit Bank v. *Frankfort,* 191 U.S. 499, 48 L. Ed. 276, 24 S. Ct. 154; *Virginia-Carolina Chemical Co.* v. *Kirven,* 215 U.S. 252, 54 L. Ed. 179, 30 S. Ct. 78; *Stoll* v. *Gottlieb,* 305 U.S. 165, 167, 83 L. Ed. 104, 106, 59 S.Ct. 134; *Oklahoma Packing Co.* v. *Oklahoma Gas and Electric* Co., 309 U.S. 4, 8, 9, 84 L. Ed. 537, 540, 60 S. Ct. 215; *Dugas* v. *American Surety Co.,* 300 U.S. 414, 428, 81 L. Ed. 720, 727, 57 S. Ct. 515; *Treines* v. *Sunshine Min. Co.,* 308 U.S. 66, 74, 86 L. Ed. 85, 91, 60 S. Ct. 44; *Taylor* v. *Carryl,* 20 (How.) U.S. 583, 597, 15 L. Ed. 1028, 1032; *Riverdale Cotton Mills* v. *Alabama & G. Mfg. Co.,* 198 U.S. 188, 48 L. Ed. 1008, 35 S. Ct. 629, 24 A.L.R. 1010; *Prout* v. *Starr,* 188 U.S. 537, 47 L. Ed. 584, 23 S. Ct. 398, 24 A.L.R. 1095.

We respectfully submit that said Supreme Court committed prejudicial error by determining that such federal decree based on said erroneous G.L.O. Survey of 1927 was virtually res judicata against petitioners and said judgments and decrees of both said Supreme Court and said trial court are probably not in accord with the applicable decisions of this court in the construction of Title 43 U.S.C.A., p. 107, Section 772.

(3) Further, in support of petitioners contention pursuant to said Rule 19 (1) (a) and Title 28 U.S.C.A., p. 88, Section 1257, and in argument supplemental to contended for federal question above stated, petitioners respectfully submit to this court that the rule of law decided and announced by the Supreme Court of Nebraska in affirming the trial court was a federal question of substance not heretofore determined by this court or decided in a way not in accord with applicable decisions of this court that accretion land located in one state could not be attached to riparian land located in another state when it said: "In the survey of the ordinary frontage-to-frontage method or apportionment was

modified by use of the incomplete 1927 line. The right bank of the river was not surveyed south of the boundary. The explanation offered by the assistant commissioner in the acceptance was that accretion located in one state could not be attached to riparian land located in another state."

"The course of the chute in Kansas, as shown in the sketch, was platted from a 1959 aerial photograph; and the evidence is persuasive that a satisfactory 1927 meander line of the bank in Kansas cannot now be established."

This court has announced the rule previously that any question concerning a state boundary line or of a compact between states presents a federal question and may be brought to this court by a petition for writ of certiorari for review. In *State of West Virginia ex rel Dyer* v. *Simms,* (W. Va. 195) 71 S. Ct. 557, 341 U.S. 22, 95 L. Ed. 713, the court held to determine the nature and scope of obligations as between states whether they arise through legislative means of compact or federal common law governing interstates controversies is the function and duty of the United States although every deference will be shown to what the highest court of the state deems to be the law and policy of its state, particularly when recondite or unique features of the law are urged. And to the same effect was the holding in *Hunderliter* v. *La Plata River & Cherry Creek Ditch Co.,* (Colo. 1938) 58 S. Ct. 803, 304 U.S. 92, 82 L. Ed. 1202.

The Supreme Court of the State and trial court should have decided this rule of law in compliance with the previous decisions that have commented upon similar fact where accretion attached to petitioner Alma M. Green's riparian land in state of Kansas extended across

Kansas-Nebraska boundary to the Missouri River was accretion to Kansas riparian land of said petitioner and she should not be barred from claiming that portion of the accretion land in the State of Nebraska lying west of the Missouri River and south of Kansas-Nebraska boundary. In *Schroeder* v. *Tyson,* 188 F. 2d 517, where the court of appeals of 8th Circuit was passing upon the question of whether United States District Court in Nebraska, had to decide between Schroeder, et al., and Tyson, et al., who was owner of claimed accretion lands along the Missouri River, the court said: "It is, however, argued that the joint resolution of the legislatures of Nebraska and Iowa concurred in by Congress, conferred rights upon the parties. But this legislation had no effect upon the title of the lands here involved. As said by the Supreme Court of Texas in *Miller* v. *Letzerich,* 121 Tex. 248, 49 S. W. 2d 404, 407, 85 A.L.R. 451, 'It is elementary that a change of sovereignty does not affect the property rights of the inhabitants of the territory involved.' See also: *United States* v. *Percherman,* 7 Pet. 51, 8 L. Ed. 604; *Airhart* v. *Missieu,* 98 U.S. 491, 25 L. Ed. 213.'" The court said in the latter case that "The division of an empire does not of itself destroy rights of property held by citizens of its different parts, though situated in a different division from that in which they may reside.

The Supreme Court of Nebraska should have announced the law to be as set out in said above cited cases that the mere fact that the claimed accretion attached to petitioner Alma M. Green's riparian Kansas land extended across the Kansas-Nebraska boundary had no effect on her title to said accretion land attached to her riparian land in Kansas and should not be barred from claiming by having established her title to the

accretion land located in the State of Kansas immediately south of the Kansas-Nebraska boundary in the cited Kansas case of *Green* v. *Ector, et al.*, supra shown in appendix.

(4) Further in support of petitioners' contentions pursuant to said Rule 19 (1) (a) and Title 28 U.S.C.A. p. 88, Section 1257, and in argument supplemental to contended for federal questions above stated petitioners respectfully submit to this court that the rule of law decided and announced by the Supreme Court of Nebraska affirming the trial court was a federal question of substance not hereto determined by this court or decided in a way not in accord with applicable decisions of this court that the judgment entered in said District Court of Doniphan County, Kansas, and affirmed by the Supreme Court of that State in *Green* v. *Ector, et al, supra,* was not entitled to the same full faith and credit as it had by usage in the State of Nebraska as required by this court in its construction of Title 28, U.S. C.A. p. 222, Section 913, when the Supreme Court of Nebraska said: "Defendants rely also upon principles of res judicata. *Green* v. *Ector*, 187 Kan. 240, 356 P. 2d 664, is said to be decisive of Alma's right to accretion. In the pleadings, findings of fact, the conclusion of law and in the judgment we discover no suggestion that title to accretion in Kansas was quieted in Alma on the basis of accretion in Nebraska. The contestants were Alma and the State of Kansas. By stipulation Alma was to prevail unless the land was an island. Nothing in that case affects any rights in this case. If a question of fact was neither directly nor indirectly in issue in a former action, a judgment in a former action clearly is not conclusive in a subsequent suit on a different cause of action. See *Boomer* v. *Olsen*, 143 Neb. 579, 10 N. W. 2d 507."

In *Green* v. *Ector*, supra, the court in its findings of fact did outline specifically how the land was formed and from such findings of fact it is clear that such was formed in a manner that only accretion could be formed attached to the riparian land of petitioner Alma M. Green, and quiet title to said land in petitioner Alma M. Green described as all that part of Lot 2, Section 6, Township 1 South, Range 19 East of 6th P.M., lying east of railroad right of way now highway and all accretions thereto and Lot 1, Section 6, Twp. 1 South, Range 19 East of 6th P.M. and all accretions thereto and all that part of Lot 2, Section 5, Twp. 1 South, Range 19 East of 6th P.M. and all accretions thereto in Doniphan County, Kansas, and included a metes and bounds description that included the west high bank of the Missouri River across which the meander line of the G.L.O. Survey of 1890 and the Thalweg Survey of 1890 commencing on the north from in Nebraska and extending south across Kansas-Nebraska boundary and along west boundary of petitioner Alma M. Green's patent and riparian land to which said accretion was attached to the north line of land owned by Joseph White Estate and distance of 4,000 feet more or less to the Missouri River and thence along the river to north to Kansas-Nebraska boundary and then west along said boundary to place of beginning 6,040 feet. If the court had determined same to have been island, it would not have been accretion land attached to petitioner Alma M. Green's riparian land shown by G.L.O. Survey of 1890 and Thalweg Survey of 1890 so the stipulation made was based on the pleaded facts and the finding of facts and conclusion of law were pursuant to same when the court that land was formed as island in the Missouri River belonging to the State of Kansas, but was accretion land formed and attached to peti-

tioner Alma M. Green's riparian Kansas land. The Supreme Court in its decision and opinion affirmed the trial court's finding of facts and conclusions of law and decree entered thereon by the trial court when it said in the syllabus point that this was an action to quiet title to certain lands bordering the Missouri River to which petitioner Alma M. Green claimed title by accretion to her contiguous land and the State of Kansas claims title to same land as being formed as a part of an island from the bed of a navigable stream and held that there was substantial evidence to support district court's findings and judgment that land was formed by accretion and not formed as an island and that the trial court did not err quieting title to all of the land in petitioner Alma M. Green to all land described in the petition. The Supreme Court of Nebraska in its construction of Title 28, U.S.C.A. p. 505, Section 1738, decided a federal question of substance either not heretofore determined by this court in a way probably not in accord with the applicable decisions of this court when in the language above set out it failed to give the same full faith and credit to the Kansas judgment and decree of the trial court and decision and opinion of the Supreme Court of Kansas in affirming the same. See Exhibit 8 shown in appendix hereto.

In *United States v.* 171.74 *acres of land, more or less in Washington County, Nebraska* (D. C. Neb. 1962) 206 F. Supp. 322, affirmed 318 F. 2d 311, the court held that the Nebraska court determination that land was in Nebraska and owned by certain parties was binding on Nebraska federal district in condemnation case, despite Nebraska court's claimed error in failing to give full faith credit to contrary Iowa judgment. In *McGee*

v. *International Life Ins. Co.* (Tex 1957) 78 S. Ct. 199, 355 U. S. 320, 2 L. Ed. 2nd 223, this court held on important question on full faith and credit of res judicata issues of judgment that petition for writ of certiorari would be granted. See to same effect *Barber* v. *Barber* (Tenn. 1944) 65 S. Ct. 137, 323 U. S. 77, 89 L. Ed. 82, 157 A. L. R. 163; *Magnolia Petroleum Co.* v. *Hunt* (La. 1943) 64 S. Ct. 208, 320 U.S. 430, 88 L. Ed. 149, 150 A. L. R. 413, rehearing denied 64 S. Ct. 483, 321 U. S. 801, 88 L. Ed. 1088.

(5) Further in support of petitioners' contentions pursuant to said Rule 19 (1) (a) and Title 28 U.S.C.A., p. 88, Section 1257 and in argument in supplement to contended for federal questions above stated petitioners respectfully submit to this court that the rule of law decided by judgment and decree of said District Court and inferencially decided by the Supreme Court of Nebraska when it affirmed the quieting of title to said accretion land lying immediately north of Kansas-Nebraska boundary and east of the old slough or chute and west of the Missouri River and in South Half of South Half of Section 31 and 32, Township 1 North, Range 19 East of 6th P.M. Said district court found and ordered that interest of C.B. & Q. R.R. Co. in its right of way prior to January 26, 1934, was a lessee and the same was not riparian; its conveyance to Richardson County, Nebraska, on that date did not convey any riparian rights to any of the real estate in question. See page 17 of certified transcript filed herein. The judgment and decree of said district court in construing Title 43, U.S.C.A. p. 222, Section 913, which provides all railroad companies to which grants for rights of way through public lands have been made by Congress, or

their successors in interest or assigns, are authorized to convey to any state, county, or municipality any portion of such right of way to be used as a public highway or street. Said Section 913 does not provide that only an easement would be conveyed to Richardson County, but rather provides that a fee would have been conveyed to said county to said right of way by C.B. & Q. Railroad in 1934 and said right of way would have extended between the riparian land along meander line of G.L.O. Survey of 1890 claimed by respondent on west high bank of Missouri River and would have prevented said claimed land of respondent from being riparian land along said meander line of G.L.O. Survey of 1890 and Thalweg Survey of 1890 by Missouri Commission. In *Missouri Valley Land Co.* v. *Wiese* (Neb. 1908) 28 S. Ct. 294, 208 U. S. 234, 52 L. Ed. 466 and *Missouri Land Co.* v. *Urich* (Neb. 1908) 28 S. Ct. 299, 208 U. S. 161, 52 L. Ed. 151, this court held the federal question presented by a claim of right under a patent of the United States to land within the placed limits of the grant made by Congressional Act in aid of branch railroads which rests upon theory that such grant was not one in praenti and therefor the title did not pass upon completion of the railroad and compliance with the terms and conditions of the grant but the land remained in the jurisdiction of the land department. In *Ruff* v. *Board of Commissioners Shawnee County* (1928) 127 Kansas 188, 272 P. 189, the court held this said section 913 was enacted to resolve the difficulties arising from previous legislation as to the power of alienation. In *Sandburg* v. *Board of Commissioners of Wyandotte Co.* (Kan. 1926) 121 Kan. 26, 245 P. 1029 held that under said Section 913 that the title to railway right of way was sufficient to comply with the statute requiring such road to be on legally established public road which was based on a

long time lease at nominal rental to the state to justify a refusal to enjoin improvement of such road.

H. Copies of all opinions are appended to this petition by reference that were delivered by the Supreme Court of Nebraska in rendering both its original judgment of June 11, 1965, and in rendering its judgment of modification on October 1, 1965, and may be found in the certified transcript filed herein at pages 30-39 and 43-46.

I. Copies of the judgments and decrees entered in the Supreme Court of Nebraska and in the District court of Richardson County, Nebraska are appended to this petition by reference that were entered respectively on June 11, October 1, and November 15, 1965, and on March 5 and April 23, 1964. See certified transcript filed herein at pages 16-26 and 30, 43 and 49.

WHEREFORE, SAID PREMISES CONSIDERED, petitioners respectfully pray that this honorable court enter an order accepting this petition for writ of certiorari to the Supreme Court of Nebraska and the District Court of Richardson County, Nebraska, and review the decisions of the Supreme Court of Nebraska, affirming the judgment and decree of said trial court and in all respects upon said hearing and review of said decision and judgment and decree reverse said decisions and judgment and decree and find and order that said courts committed reversible error in their respective decision and decrees on the federal questions presented in this petition and that this court enter the judgment and decree which should have been entered by said Supreme Court of Nebraska and the District Court of Richardson County and that these petitioners and appellants have

all other legal and equitable relief under all the rules, authorities and acts of Congress to which they are entitled in the premises.

Respectfully submitted,

ALMA M. GREEN AND HARRY GREEN,
Petitioners

By _____

For OTTO KOTOUC, JR.
Humboldt, Nebraska

WILLIAM L. WALKER
EARL LUDLAM
636 Stuart Building
Lincoln, Nebraska
Their Attorneys.

APPENDIX

Decree of the District Court of Richardson County, Nebraska.

Filed Mar. 12, 1964

Now on this 5th day of March, 1964, this matter came on for decision; the Plaintiff was present by its President, G. M. Osgood and by its attorney, Simon Lantzy of Wiltse-Wiltse-Lantzy; the Defendant Alma M. Green was present with her attorneys, Otto Kotouc, Jr. and William L. Walker; the court having considered the evidence submitted by the parties at the trial hereof and upon consideration of the briefs filed by the parties and being fully advised on the premises finds as follows:

1. That the Court has jurisdiction of the parties and of the subject matter.

2. That all of the real estate in dispute in this action is located in and a part of Richardson County, Nebraska.

3. That the defendants, John E. Williams and Zelma B. Williams, husband and wife, have no right, title, interest, claim, lien or demand in or to any part of the real estate in dispute in this action.

4. That plaintiff seeks to quiet title in it in and to the two separate tracts of real estate situated in Richardson County, Nebraska, that have been described in its amended petition, to-wit:

Tract "A": S½ SE¼ of Section 36, Twp. 1, N, Rge 18, East of the 6th P.M.;

S½ S½ of Section 31, Twp. 1, N, Rge 19, East of the 6th P.M.;

All that part of the S½ S½ of Section 32, Twp 1, N, Rge 19, East of the 6th P.M., lying west of the center of the channel of the Missouri River.

Tract "B": The 29.10 acres of the SE¼ NE¼ of Section 36, Twp 1, N, Rge 18, East of the 6th P.M., lying east of the Missouri River as it was surveyed by the U. S. Government in the year 1890;

S½ N½ of Section 31, Twp 1, N, Rge 19, East of the 6th P.M.;

All that part of the S½ N½ of Section 32, Twp 1, N, Rge 19, East of the 6th P.M., lying west of the center of the channel of the Missouri River;

Tracts "A" and "B" are separated by lands and accretions thereto owned and possessed by the United States of America, referred to in this action as Indian Land. The United States of America was not made a party to this action by either the plaintiff or the defendant.

5. That defendants Green disclaim any right, title or interest to that part of Tracts "A" and "B" located and lying west of the old slough that crosses the West Half of said Section 31 in a generally north and south direction, except a part thereof alleged to be located immediately north of the Kansas-Nebraska state line and claimed by defendant Alma M. Green by adverse possession, the description of which was not established either by the pleadings or the evidence.

6. That all that part of Tracts "A" and "B" that lies east of the west bank of the Missouri River, as established and surveyed in 1890, is accretion land; that the same is riparian to the lands of the plaintiff and its predecessors in title.

7. That the interest of the C. B. & Q. Railroad in its right-of-way prior to January 26, 1934, was as a lessee and the same was not riparian; its conveyance to Richardson County, Nebraska, on that date did not convey any riparian rights to any of the real estate in question.

8. That all unknown defendants as set forth in the caption of plaintiff's amended petition are in default and their default is entered; said defendants and each of them have no right, title, interest, claim or demand in and to any of the real estate first described.

9. That defendant Alma M. Green did not establish title in herself to her Kansas lands described in Case No. 8968 entitled Alma M. Green versus John T. Ector, et al, as recorded in Doniphan County, Kansas, by using the proportionate method of allocating accretion lands.

10. The reports filed by both plaintiff and defendant and as amended by plaintiff, are both true and correct, and same are approved as filed.

11. That defendants failed to establish title by a preponderance of the evidence in any of the defendants by adverse possession to any part of the real estate in the State of Nebraska.

12. That defendants Green failed to establish by the evidence that it would be equitable to allocate the accretion lands by the proportionate method. On the contrary, doing equity requires that all of the accretion lands herein must be allocated by extending the Kansas-Nebraska state line and existing sectional lines eastward to the thread of the Missouri River and attaching the accretion lands as now formed to the Nebraska riparian owners as determined by the extended lines, to-wit: the plaintiff in fee simple.

The Court therefore finds generally for the plaintiff and against the defendants on plaintiff's amended petition and prayer of defendants' cross-petition should be denied and the petition dismissed. The title to the real estate described as Tracts "A" and "B" should be quieted and confirmed in the plaintiff and against the

defendants and all of them should be permanently enjoined from entering the premises described as Tracts "A" and "B", or any part thereto. That the bond filed by the plaintiff of the sum of $15,000.00 as required by the temporary injunction entered April 2, 1963, be and the same is hereby discharged and declared void. The defendant Alma M. Green shall pay to the plaintiff as damages the sum of $27.61 and pay the costs of this suit.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that a Decree is hereby entered in accordance with the findings above.

Journal Entry in the District Court of Richardson County, Nebraska.

Filed Apr. 28, 1964

Now on this 23rd day of April, 1964, this matter came on to be heard upon the Plaintiff's Motion For A New Trial and upon the Defendants' Motion For An Order Vacating Decree and in the alternative a Motion For An Order Vacating Decree and in the alternative a Motion For A New Trial. The plaintiff was represented by one of its attorneys, Simon Lantzy of the firm of Wiltse, Wiltse & Lantzy, and Dr. G. M. Osgood, President of the Plaintiff, appeared in person; and the Defendants Green were represented by their attorneys, William L. Walker and Otto Kotouc, Jr.

Both parties having previously submitted briefs to the Court, both parties waived oral argument and submitted the matter to the Court.

Upon consideration of the records and files contained herein and upon consideration of the evidence presented

at the trial of the matter and the Court being fully advised in the premises finds that the Plaintiff's Motion For A New Trial should be overruled and the Defendants Green's Motion For An Order Vacating The Decree of the Court and in the alternative its Motion For A New Trial should be overruled.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion For A New Trial should be and the same is hereby overruled, and the Defendants Green's Motion For An Order Vacating The Decree filed herein should be and the same is hereby denied and in the alternative the Defendants' Motion For A New Trial be and the same is hereby overruled.

Judgment of the Supreme Court of Nebraska.

Dated June 11, 1965

This cause coming on to be heard upon appeal from the district court of Richardson County was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error in that part of the judgment of said district court concerning land located west of the 1890 meander line and not abutting Lot 3, and in this respect said judgment is affirmed and in other respects reversed and the cause remanded for proceedings consistent with the opinion of this court this day filed herein; that each party pay its own costs on appeal, costs of the appellant taxed at $20.00, and costs of appellee taxed at $5.00; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Appendix

Opinion of the Supreme Court of Nebraska.

Filed June 11, 1965

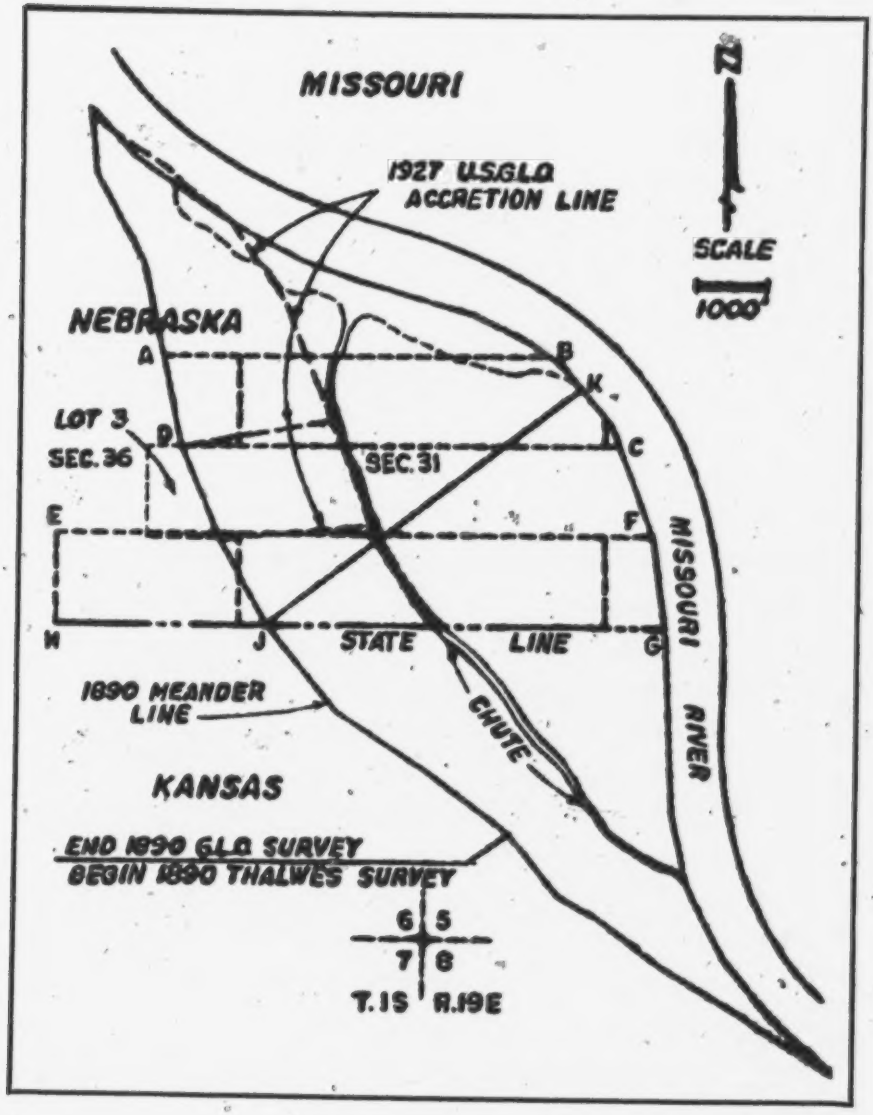
The district court quieted title in plaintiff to uplands and accretions located in Richardson County and along the Missouri River. The principal issue is the proper method of apportioning accretions.

Reference to the sketch which appears on the following page will simplify some problems. The right bank of the Missouri River in 1890 is shown by the 1890 meander line, which separates the accretions from the uplands. Title was quieted in plaintiff to tracts ABCDA and EFGHE. Defendents have renounced any interest in the disputed land located west of the eastermost 1927 U.S.G.L.O. accretion line, except for an undefined part of the lower tract which they are claiming by adverse possession.

Titles to certain other lands are unchallenged, but they are relevant to our disposition of the apportionment issue. The United States holds in trust Lot 3, also known as the Indian land; but it is not a party to this suit. We are unable to determine the nature of the trust or the applicability of state law.

Defendant Alma M. Green, hereinafter called Alma, with whom the other defendants are in privity, owns land riparian to the 1890 meander line south from the Kandas-Nebraska boundary to a point below the end of the 1890 U.S.G.L.O. survey, together with all Kansas accretions extending east to the present bank of the river.

Defendants urge us to apply the ratio of frontages on the 1890 meander line to the new bank. See, Swanson v. Dalton, *ante* p. 55, 131 N.W. 2d 704; Conkey v. Knudsen, 143 Neb. 5, 8 N.W. 2d 538. By that formula Alma would gain all accretions south of line JK, al-


MISSOURI
1927 U.S.G.L.O.
ACCRETION LINE
SCALE
1000
NEBRASKA
A
B
K
LOT 3
SEC. 36
D
SEC. 31
C
E
F
MISSOURI RIVER
H
J
STATE LINE
G
1890 MEANDER LINE
CHUTE
KANSAS
END 1890 G.L.O. SURVEY
BEGIN 1890 THALWES SURVEY
6
5
7
8
T. 1S R. 19E

though the allocation would be diminished by her disclaimer.

A weighty factor in selecting an appropriate method of division is a prior action involving the Indian land. In 1929 the United States obtained a judgment by confession against defendants who are predecessors in title of the present parties. In that case the court added to Lot 3 the accretion bounded on the north, south, and east by the 1927 U.S.G.L.O. lines.

The judgment was rendered in accordance with a plat of survey executed by the United States Surveyor in 1927 and accepted by the Commissioner of the General Land Office. In the sketch the eastermost 1927 U.S. G.L.O. line, which is located in Nebraska, represents the 1927 meander of the right bank.

In the survey the ordinary frontage-to-frontage method of apportionment was modified by use of the incomplete 1927 line. The right bank of the river was not surveyed south of the state boundary. The explanation offered by the assistant commissioner in the acceptance was the accretion located in one state could not be attached to riparian land located in another state.

The course of the chute in Kansas, as shown in the sketch, was platted from a 1959 aerial photograph; and the evidence is persuasive that a satisfactory 1927 meander line of the bank in Kansas cannot now be established.

The 1929 judgment is not to be ignored. " * * * a judgment may be an operative fact * * * although the rules of res judicata are not applicable." Restatement, Judgments, s. 111, p. 527.

General principles governing allocation of alluvion, reliction, and frontage lose utility when we unbalance

competing needs for uniformity and flexibility. See Cramer v. Perine, 251 N. Y. 177, 167 N.E. 213. The judgment under review, in prolonging the sidelines easterly beyond the chute, is not responsive to the equitable demand for flexibility under the evidence.

The exceptional facts in the case at bar impel us to adopt the 1927 meander line in Nebraska as the old bank to be measured under the frontage-to-frontage method approved in Conkey v. Knudsen, *supra*. Whether or not the 1929 judgment was erroneous, it is an equitable barrier to use of the 1890 line. Our conclusion defeats defendants' claim to any land as accretion to Kansas uplands.

Defendants also rely upon principles of res judicata. Green v. Ector, 187 Kan. 240, 356 P. 2d 664, is said to be decisive of Alma's right to accretion.

In the pleadings, the findings of fact, the conclusions of law, and the judgment we discover no suggestion that title to accretion Kansas was quieted in Alma on the basis of accretion in Nebraska. The contestants were Alma and the State of Kansas. By stipulation Alma was to prevail unless the land was an island.

Nothing in that case affects any right in this case. If a question of fact was neither directly nor indirectly in issue in a former action, a judgment in the former action clearly is not conclusive of the question in a subsequent suit on a different cause of action. See Boomer v. Olsen, 143 Neb. 579, 10 N.W. 2d 507.

Although defendants have no interest, evidence should be taken on remand in order that accretions east of the 1927 meander line may be apportioned in accordance with the method which we approve on the evidence

before us. This conclusion and the state of the record are our reasons for pretermitting decision on plaintiff's claims to this land by adverse possession and record title.

Defendants' disclaimers and plaintiff's evidence of possession and chains of title to land west of the 1927 meander line amply support the findings and judgment in that respect except for the interest of the United States. Several discrepancies in description should be considered on remand. The tract adjoining Lot 3 on the south and the tracts adjoining the north and south boundaries of the accretion added to Lot 3 in the 1929 judgment lack common boundaries with the Indian land. Justification does not appear.

To guide the proceeding on remand we turn to other branches of the controversy. The findings and judgment against defendants on their claim by adverse possession are correct. Contentions concerning causes of action against Alma for removal of 1962 and 1963 crops are open to disposition by the district court.

The judgment is affirmed as to the part concerning land located west of the 1890 meander line and not abutting Lot 3, and the judgment is reversed as to the other parts. The cause is remanded for proceedings consistent with this opinion, each party to pay his own costs.

Judgment of Modification on Motion for Rehearing in the Superme Court of Nebraska.

Dated October 1, 1965

This cause coming on to be heard upon motion of appellants and cross appellees for a rehearing herein

was argued by counsel and submitted to the court; upon due consideration whereof, the court finds that the opinion of this court filed on June 11, 1965 and the judgment entered thereon should be, and hereby are, modified to provide that the title to tracts ABCDA and EFGHE should be quieted in plaintiff subject to the interest of the United States or its privies and that the part of the district court judgment quieting title should be affirmed as so modified and further that the opinion filed on June 11, 1965 is in all other respects adhered to.

Opinion of the Supreme Court of Nebraska.

Filed October 1, 1965

Upon reconsideration of that part of the judgment in which the district court quieted title in plaintiff to tracts ABCDA and EFGHE, we now conclude that title should be quieted in plaintiff subject to the interest of the United States or its privies and that the part of the district court judgment quieting title should be affirmed as so modified. Since no one else is affected and the United States is not a party to this suit, an inquiry on remand into the boundaries of the Indian land, including accretions, for this single purpose would not be worth while. We accordingly modify our opinion filed in this case June 11, 1965, (178 Neb. 807, 135 N. W. 2d 718) but we adhere to it in all other respects.

Defendants have submitted a motion for rehearing which is directed to other issues. It is overruled.

Appendix

Order of the Supreme Court of Nebraska Overruling Motion for Rehearing.

Dated November 15, 1965

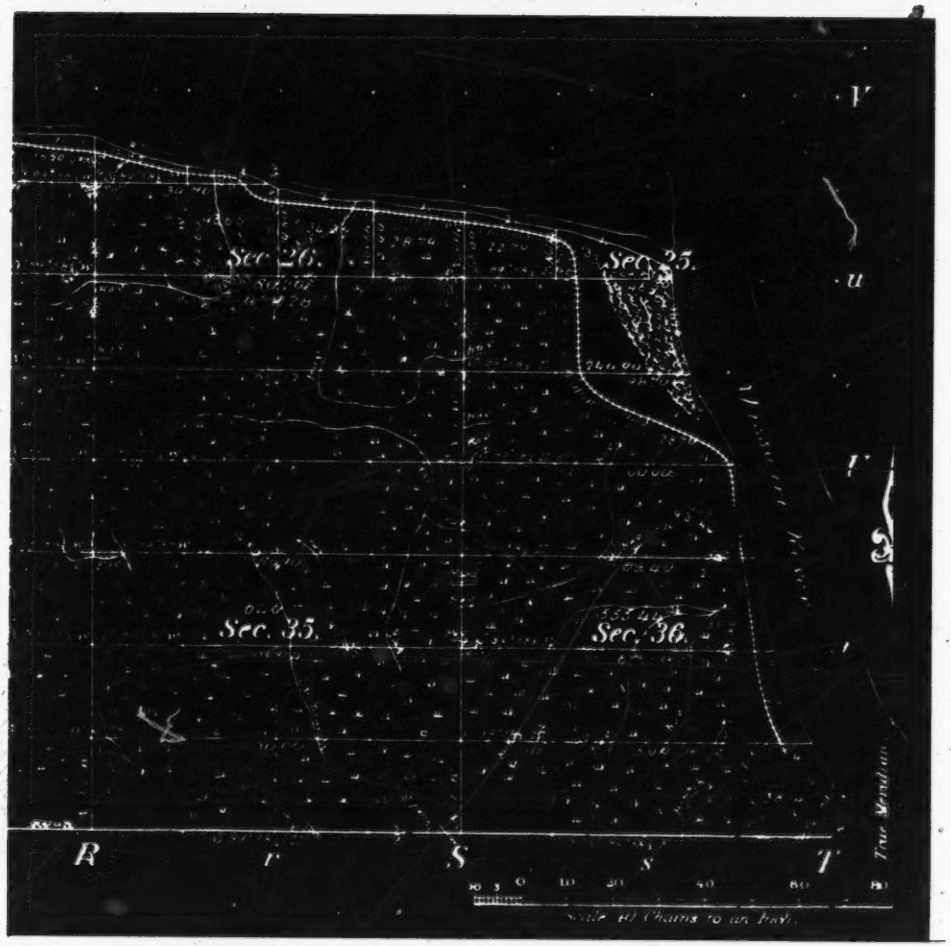
This cause coming on to be heard upon motion of appellants for a rehearing herein was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, considered, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein is denied.

Order of the Supreme Court of Nebraska Withholding Mandate.

Dated November 15, 1965

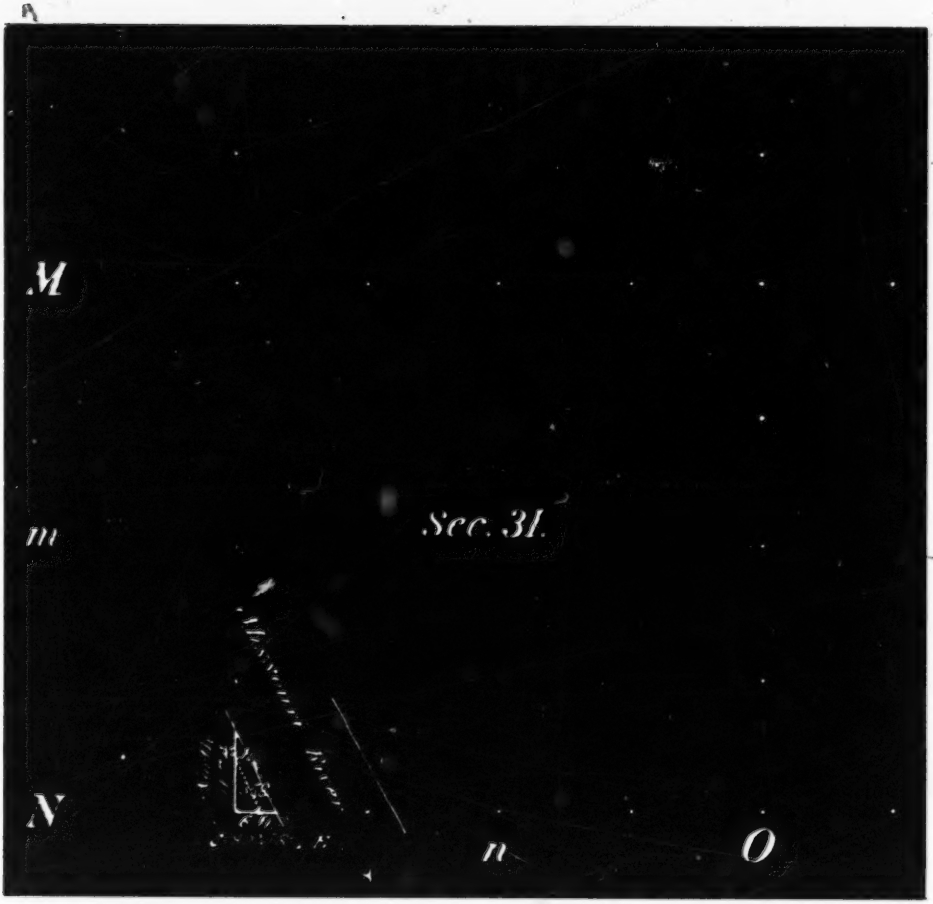
This cause coming on to be heard upon application of appellants for stay of mandate was submitted to the court; upon due consideration whereof, it is by the court ordered that said application be, and hereby is, sustained; and issuance of mandate is withheld until February 15, 1966.

**Portion of Twp. 1 N., R. 18 E., 6th P.M., Nebraska—
Exhibit 11**

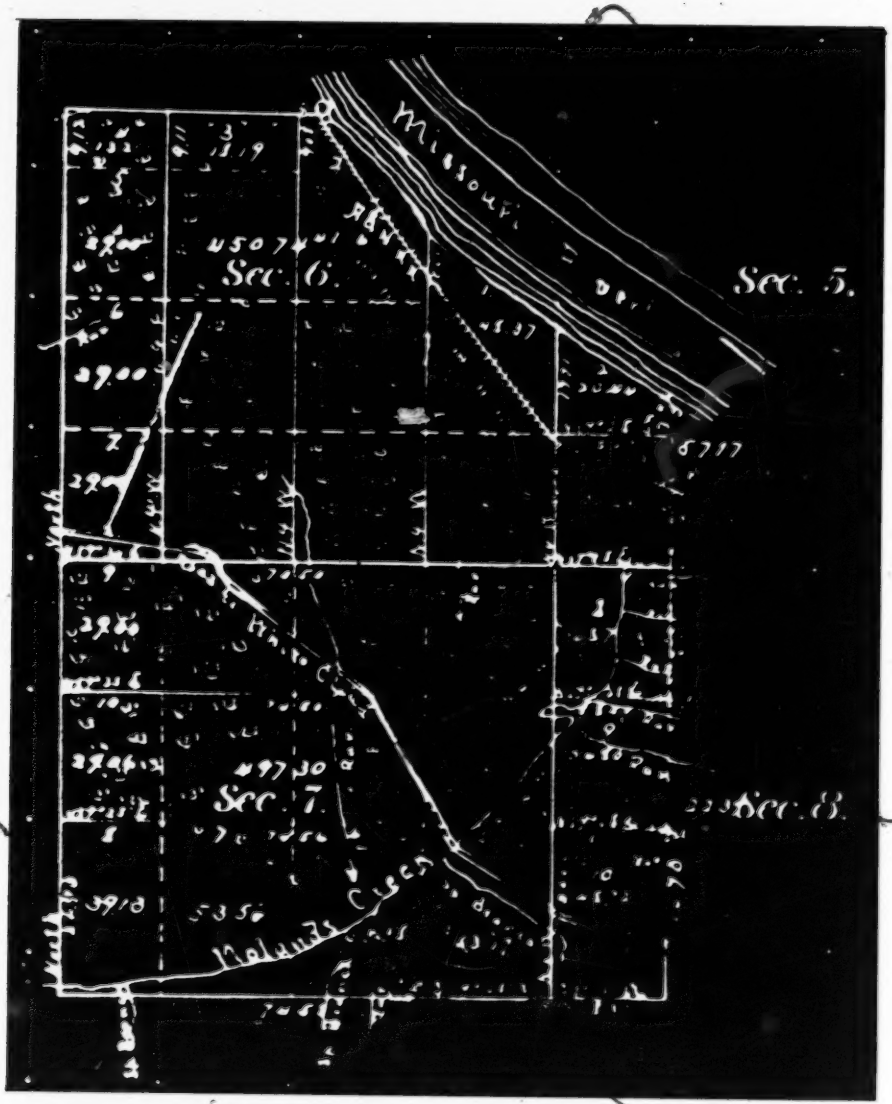


Appendix

Portion of Twp. 1 N., R. 19 E., 6th P.M., Nebraska—Exhibit 12



G.L.O. Survey of 1890 of Twp. 1 S., R. 19 E., 6th P.M., Kansas—Exhibit 55



Supplemental Plat of S. 36, Twp. 1 N., R. 18 E., 6th P.M., Nebraska—Exhibit 56

MEMORANDUM

This plat delineates a retractment and reestablishment of the lines defining the lands in Section 36, Township 1 North, Range 18 East, 6th Principal Meridian, Nebraska, as shown upon the plat of the original survey approved June 19, 1891, in their true original position according to the best available evidence of the position of the original corners, and an extension survey including lands formed by accretion. The heavy irregular line delineates the position of the meander line of the right bank of Missouri River as surveyed in 1890. All differences between the measurements shown on the original plat and those derived in the retractment here have been distributed proportionally between accepted corners in accordance with surveying rules.

Titles and areas based upon the original plat remain undisturbed for position and description. The area of Lot 3 of Section 36 is shown in two parts: part "a" denoting the original area as shown upon the plat of the survey approved June 19, 1891, and part "b" denoting the accretion area of the present survey.

Office of the U.S. Supervisor of Surveys.
Denver, Colorado, January 5, 1928.

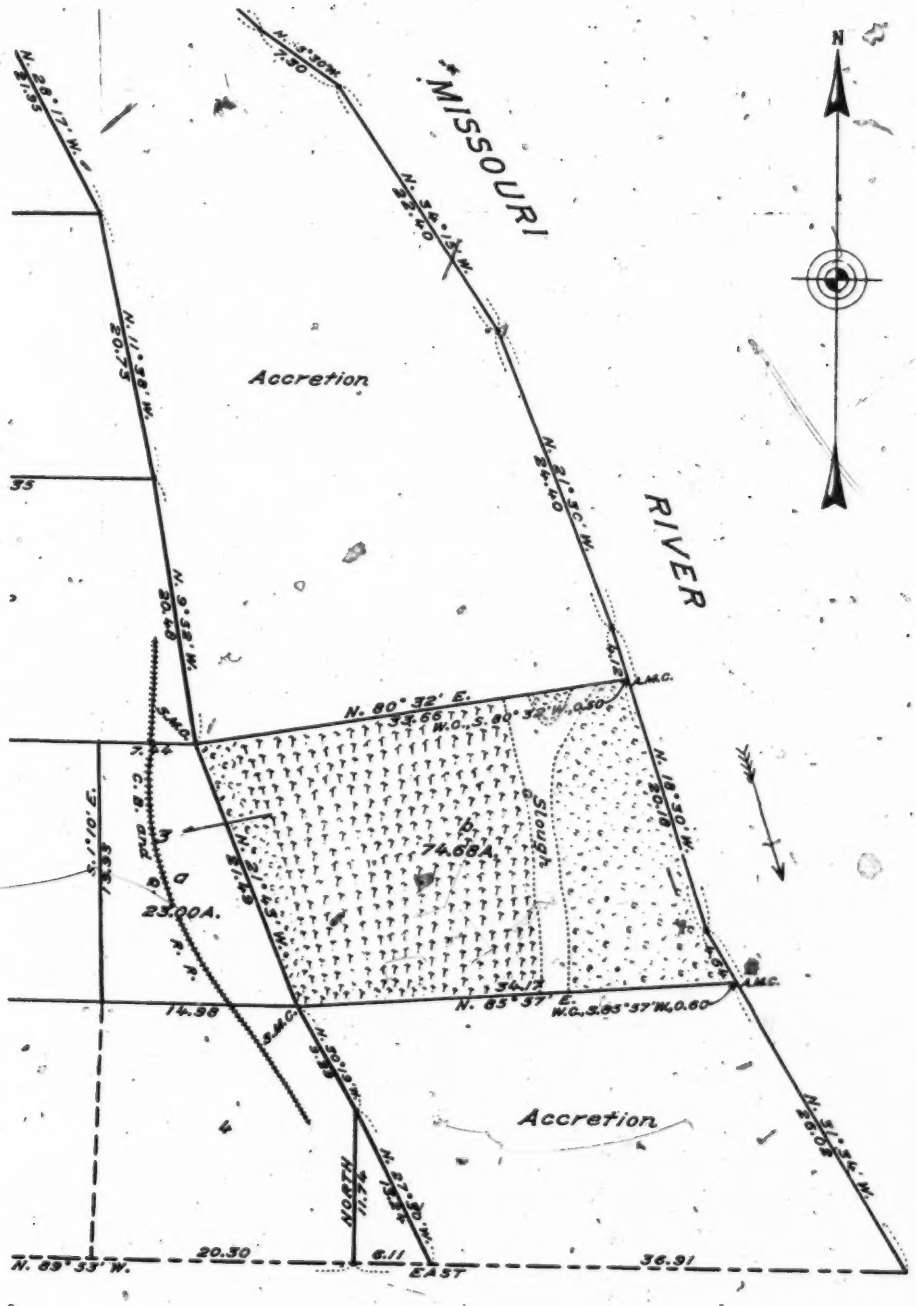
The above supplemental plat of Section 36, Township No. 1 North, Range No. 18 East, of the Sixth Principal Meridian, in the State of Nebraska, is strictly conformable to the field notes of the resurvey thereof, which have been examined and approved.

U. S. Supervisor of Surveys.

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.
Washington, D. C., February 28, 1928.

The survey represented by this plat, having been correctly executed in accordance with the requirements of law and the regulations of this office, is hereby accepted.

Assistant Commissioner.


N
MISSOURI
RIVER
Accretion
Accretion
Slough
74.08A.
23.00A.
N. 26° 17' W. 21.33
N. 11° 58' W. 20.73
N. 9° 52' W. 20.43
N. 39° 15' W. 22.40
N. 21° 55' W. 24.40
N. 18° 30' W. 20.78
N. 5° 54' W. 26.03
N. 80° 32' E. 34.66
W.C. S. 80° 32' W. 0.60
N. 85° 37' E. 34.72
W.C. S. 85° 37' W. 0.60
N. 27° 30' W. 7.33
N. 89° 33' W. 20.30
6.11
EAST
36.91
NORTH
14.98
35
A.M.C.
R. R.

Thalweg Survey of 1890—Exhibit 54

Projection from secon
Shore line from su
Stage of water, ze
Topography mainly

Acceptance of Resurvey—Exhibit 98

Dated March 5, 1928

Receipt is acknowledged of your letter dated January 5, 1928, transmitting the returns of the survey of the accretion attaching to Lot 3, Sec. 38, T. 1 N., R. 18 E., 6th P.M., Nebraska, consisting of the original supplemental plat of Sec. 36 and the original, duplicate and triplicate transcripts of field notes.

The examination of the returns shows that the boundaries of Lot 3, Sec. 36, based upon the plat of the original survey, have been reestablished in a satisfactory manner; also, that the frontage of the accretion line north of the projected boundary between Kansas and Nebraska has been divided proportionately between the riparian claimants in Nebraska.

In this case it appears that the intersection of the State line projected east along the parallel of 40° to its intersection with the present bank of the river will qualify as a point to proportion against. The riparian rights of the owners of the original subdivisions along the river in Kansas are limited by the south boundary of Nebraska. The accretion north of the State line therefore attaches to the subdivisions in Nebraska, and the method used in determining the direction of the boundaries of the accretion attaching to Lot 3 gives a proportionate division of the frontage to the riparian claimants in Nebraska.

The survey having been correctly executed, was accepted on February 28, 1928, and when the plat is photolithographed the usual copies will be transmitted to your office.

Appendix

Instructions for Making Resurvey—Exhibit 98

Dated May 16, 1927

Procedure.

Your first step will be the restoration in their original position of all corners of the Government survey affecting Lot 3, Sec. 36, T. 1 N., R. 18 E., 6th P.M., Nebraska, with all necessary sustaining corners as evidence of this location so there can be no question as to your location of this lot. You will then locate the corners of Lot 3 from the restored Government survey. The next step will be the proper delineation and location of the accretion to the above Lot 3.

Your attention is called to these major principles involving the legal aspect of the question of accretion and you will note that accretion is an imperceptible addition to riparian land which is made by water to which the land is contiguous. Imperceptibility is a leading and essential characteristic of accretion.

The right to accretion depends on the formation subsequent to the purchase of land and, accordingly, a riparian owner cannot claim title to accretion when the formation occurred before he obtained his grant from the Government and the latter has already sold the land as accretion to other parties. As the Government does not warrant the patentee against loss, so it cannot claim the gains to his lands. The interest of the Government as a riparian proprietor ceases on the sale of a meandered tract and all accretions to such tract after survey and prior to sale passes to the purchaser. Accretion belongs to the land on which the formation begins and from which it extends. A riparian owner on a navigable stream who derives his title from the Government takes

to the high water mark only and not to the middle of the stream.

The line of high water mark is to be found by examining the bed and banks and ascertaining where the presence and action of water are so common and usual and so long continued in all ordinary years as to mark the soil of the bed a character distinct from that of the banks in regard to vegetation as well as in regard to the nature of the soil itself. Low water is the point to which the water recedes at its lowest ordinary stage; high water mark is the point to which the water rises at its average stage.

The control and right to dispose of public land lying under a navigable stream that forms the boundary of a State and within the limits thereof passes from the Government to the State on its admission to the Union, and if any sudden change occurs thereafter in the course of such stream the reliction lying within said State is not the property of the United States (Gillespie vs. State of Nebraska, 25 L. D. 124). Upon the admission of a State into the Union it acquires absolute proprietorship in and dominion and sovereignty over all soils under the navigable waters within its borders but islands therein formed prior to the admission of the State remain the property of the United States subject to disposal as other public lands.

It would be well to note that in the survey of lands bordering upon a body of water the meander line is not run as a boundary but for the purpose of ascertaining the quantity of land in the subdivisions rendered fractional by the reason of their bordering upon the water.

To constitute an island in the river, it must be permanent in character, not merely surrounded by water

when the water is high but permanently surrounded by a channel of the river. When an island springs up in the middle of a stream it is an accretion to the soil in the bed of the river and is not the land of the riparian owner although it afterwards becomes united with the mainland. An island not above high water mark and subject to overflow and situated in a navigable river is not subject to survey and disposal as land belonging to the United States, for the proprietorship of shores and beds of navigable rivers below high water mark within the limits of States belongs to them by their inherent sovereignty.

Whether a riparian owner holds title in fee to the center of a navigable stream or to low water mark or to high water mark must be determined by the laws of the State in which the upland is situated.

The burden of proving that land was an accretion so as to belong to the party claiming it is to the party having the affirmative of the issue (Bissel vs. Fletcher, 27 Nebr. 582; 43 NW. 350).

The State of Nebraska as never asserted any title or dominion over abandoned river beds but has left the riparian owners in full possession and control of the same to the thread of the stream (109 NW. 746, Kinkaid vs. Turgon).

It might be stated that if land is bounded by a road or street along a stream, the owner is not entitled to accretion on the opposite side of road or street unless, of course, an exception is made by the deed or transfer. However, in this case, the point need not be considered by the engineer, as it is a strictly legal point and will have nothing to do with fixing the limits of accretion.

Nebraska was admitted to the Union on March 1, 1867; in this connection it will be noticed that the Indian Reservation in which this lot is situated was ceded to the Indians prior to the admission of Nebraska as a State. This fact will have some bearing in regard to the above mentioned facts relative to accretion.

Now, in regard to dividing this accretion among the riparian owners, it will be noted that the rule varies in different states. Under a recent ruling of the United States Supreme Court in the case of Johnston vs. Jones (1 Black, 209, 222, 223) it is stated that where areas of accretion intervene from the river to the abandoned channel an equitable division of the accretion obviously determines the position of the boundary lines, x x x x and it is further stated that the boundary lines in these areas were located by dividing the accretion under the rule of proportion. The general rule in Nebraska and South Dakota in the division of accretion is the ratio which the original meander line bears to the actual amount of accretion under consideration. You will, therefore, in this case, after the reestablishment of the original position of Lot 3, reconstruct a meander line as indicated by the original plat, and proceed to find the amount of accretion. The question to be solved is an equitable division of the old and new shore lines between the several riparian owners. Specifically, measure along the old bank and compute the number of chains owned by each property holder, divide the new bank into as many equal parts as there are chains in the old bank, then draw lines from the old points of division to the new ones, taking the general trend of the shore line.

A topographic survey will be made of the areas surveyed under this group for the purpose of securing such

data as to the natural features and improvements thereon as should be shown on the plat of the survey.

In the monumentation of the survey, all corners established, or reestablished, will be monumented with regulation iron posts appropriately marked and witnessed in accordance with the provisions of Chapter 4 of the Manual.

The field notes will contain a complete technical record of the survey. The General Description following the body of the field notes will contain the usual and full notes upon the character of the land, soil and timber and the nature and extent of the settlement or improvement on the area surveyed.

The plat of the survey will be so construed as to give full pertinent details in connection with this survey.

All papers transmitted herewith, including the original copy of these instructions, will be filed with the returns of your survey, together with such other data or correspondence as may be acquired during the progress of the field work.

If occasion should arise requiring an interpretation of these instructions, or additional instructions, you will address your questions to the undersigned with a full report of conditions requiring such instructions.

Journal Entry in Case No. 8968 in District Court of Doniphan County, Kansas—Exhibit 8

Filed August 10, 1959

Now on this 21st day of May, 1959, at 9:30 o'clock A.M., this cause comes regularly on for trial. Plain-

tiff appears in person and by and through her attorneys, Jack A. Quinlan and Eugene W. Hiatt, of Quinlan, Hiatt, Listrom & Dimmitt, of Topeka, Kansas and Robert Guier, of Troy, Kansas and the defendant, The State of Kansas, appears by and through its attorneys, Robert C. Londerholm, Assistant Attorney General of the State of Kansas and Jack R. Euler, County Attorney, Doniphan County, Kansas. There are no other appearances. The evidence for the plaintiff being fully heard relative to plaintiff's ownership of the land described in her second amended petition and the defendant, the State of Kansas, orally and generally demurs to the plaintiff's evidence, which demurrer was by the court after due consideration overruled; and the defendants proceed to present their evidence to the Court as per their cross-petition and such trial not being completed at the hour of adjournment the court was adjourned until the 22nd day of May, 1959 at 9:30 o'clock A.M. at which time the further consideration of the cause was to be continued.

And now on this 22nd day of May, 1959 the hour of 9:30 A.M. having arrived came the parties heretofore mentioned and present as before and the court proceeded with the trial of this cause and the defendant concluded the presentation of its evidence in support of its cross-petition, and rested its case in chief. The plaintiff proceeds with rebuttal evidence in accordance with the prayer of her petition and to refute the evidence of the defendant, and now the evidence of the plaintiff and the defendant having been fully heard and plaintiff's exhibits marked 1 through 10 having been admitted into evidence and the defendant's exhibits marked 1 through 11 being before the court and arguments of counsel are fully heard the court advises the parties that the cause shall be taken under advisement

by the court, and that the parties to the cause shall be allowed thirty days to submit memorandum briefs, suggested findings of fact and conclusions of law; thereupon the court further advises the parties that the decision shall be rendered after the submission of memorandum briefs, suggested findings of fact and conclusions of law by the parties to the cause and the hour of 3:30 P.M., May 22, 1959 having arrived the court advises that the cause shall be recessed pending final decision of the court.

And the parties having submitted their memorandum briefs, conclusions of law and suggested findings of fact and the 10th day of August having arrived the court files its decision in the matter with the Clerk of the Court and the court further files its findings of fact and conclusions of law as follows:

"It has been stipulated in the Pre-Trial Order dated April 17, 1959 that the issue in question is whether or not the real estate involved in this action was formed as part of an island from a navigable stream; if this real estate in question is part of such island then the defendant would prevail; if not then the plaintiff would prevail.

FINDINGS OF FACT:

1. The real estate is described as follows:

That part of Sections 4 and 5, Township 1, Range 19, in Doniphan County, Kansas, bounded as follows: Commencing at a point where the West bank of the present main channel of the Missouri River intersects the Kansas-Nebraska State Line, thence West along said line 3500 feet, more or less, to a slough, thence in a southeasterly direction along the slough 5,150 feet, more or less, to the point of its convergence with the present main

channel to the Missouri River, thence northwesterly along the West bank of the present main channel of the Missouri River to the point of beginning.

2. In the year 1891 the Missouri River ran along the Chicago, Burlington and Quincy Railroad. This railroad has now been abandoned and the old railroad bed is now Kansas Highway Number 7.

3. The Missouri River moved eastward gradually from the year 1891 to its present location, a distance of approximately 6,000 feet along the Kansas-Nebraska State Line.

4. The land in question, like other lands along the Missouri River, formed as small bars, often referred to as 'floating bars', just below the surface of the water; and as the river changed its channel they would eventually be deposited along the river bank. The river would flow around the land that was filling in along the bank, which would break the current and this would cause large eddys to form, sometimes covering as much as 80 acres. The eddy would follow down the river as the land or floating bars filled in.

5. After the land in question was formed a chute or slough formed in its present location west of the channel of the Missouri River. This chute formed sometime probably between the year 1926 and 1928. This chute or slough was formed by putting dikes up along the Missouri bank of the channel of the Missouri River forcing the water over to the Kansas-Nebraska side of the channel; but the cutting to form this slough or chute started in Nebraska. Trail dikes were then constructed to stop the cutting in this chute or slough, and the water only flows through this chute or slough during high water periods, usually in the spring and fall of the year.

6. This land in question is between this chute or slough on the west and the channel of the Missouri River on the east.

CONCLUSIONS OF LAW:

1. This land in question was formed by accretion and was not formed as an island from the bed of the navigable stream of the Missouri River. The Court, therefore, finds generally for the plaintiff and against the defendant; and the title to said real estate is hereby quieted against the defendant. This decision to be effective Monday, August 10, A.D., 1958."

S/Chester C. Ingels
Chester C. Ingels, Judge
22nd Judicial District
State of Kansas"

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED, that the findings of fact and conclusions of law in this cause are as follows:

"It has been stipulated in the Pre-Trial Order dated April 17, 1959 that the issue in question is whether or not the real estate involved in this action was formed as part of an island from a navigable stream; if this real estate in question is part of such island then the defendant would prevail; if not then the plaintiff would prevail."

FINDINGS OF FACT:

1. The real estate is described as follows:

That part of Sections 4 and 5, Township 1, Range 19, in Doniphan County, Kansas, bounded as follows: Commencing at a point where the west bank of the present main channel of the Missouri River intersects the Kansas-Nebraska State Line, thence West along said line 3500 feet, more or less, to a slough, thence in a southeasterly direction along the slough 5,150 feet, more or less, to the point of its convergence with the present main channel to the Missouri River, thence Northwest-

erly along the west bank of the present main channel of the Missouri River to the point of beginning.

2. In the year 1891 the Missouri River ran along the Chicago, Burlington and Quincy Railroad. This railroad has now been abandoned and the old railroad bed is now Kansas Highway Number 7.

3. The Missouri River moved eastward gradually from the year 1891 to its present location, a distance of approximately 6,000 feet along the Kansas-Nebraska State Line.

4. The land in question, like other lands along the Missouri River, formed as small bars, often referred to as 'floating bars', just below the surface of the water; and as the river changed its channel they would eventually be deposited along the river bank. The river would flow around the land that was filling in along the bank, which would break the current and this would cause large eddys to form, sometimes covering as much as 80 acres. The eddy would follow down the river as the land or floating bars filled in.

5. After the land in question was formed a chute or slough formed in its present location west of the channel of the Missouri River. This chute formed sometime probably between the years 1926 and 1928. This chute or slough was formed by putting dikes up along the Missouri Bank of the channel of the Missouri River forcing the water over to the Kansas-Nebraska side of the channel; but the cutting to form this slough or chute started in Nebraska. Trail dikes were then constructed to stop the cutting in this chute or slough, and the water only flows through this chute or slough during high water periods, usually in the spring and fall of the year.

6. This land in question is between this chute or slough on the west and the channel of the Missouri River on the east.

CONCLUSIONS OF LAW:

1. This land in question was formed by accretion and was not formed as an island from the bed of the navigable stream of the Missouri River. The Court, therefore, finds generally for the plaintiff and against the defendant; and the title to said real estate is hereby quieted against the defendant.

   This decision to be effective Monday, August 10, A.D., 1959."

S/Chester C. Ingels
Chester C. Engels, Judge
22nd Judicial District,
State of Kansas

IT IS THEREFORE BY THE COURT FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECRED that the plaintiff is adjudged to be the owner in fee simple of the following described real estate:

All that part of Lot Two (2) of Section Six (6), Township One (1), Range Nineteen (19), lying east of the right-of-way of the Atchison and Nebraska Railroad Company, (sometimes referred to as the right of way of the Chicago, Burlington and Quincy Railroad Company) and all accretions thereto,

All of Lot One (1) of Section Six (6), Township One (1), Range Nineteen (19), and all accretions thereto. All of that part of Lot Two (2) of the Southwest Quarter of Section Five (5), Township One (1), Range Nineteen (19), and all accretions thereto, lying North of land owned by the Joseph White Estate.

The above described real estate is also described as follows: Beginning on the North line of Lot Two (2), of Section Six (6), Township One (1), Range Nineteen (19), where the same intersects the East right-of-way line of the right-of-way of The Atchison and Nebraska Railroad Company (sometimes referred to as the right-of-way of the Chicago, Burlington and Quincy Railroad Company), thence Southeasterly

along said right-of-way to the point of intersection with the West line of Lot One (1) of said Section Six (6), thence South to the Southwest corner of said Lot One (1), thence East to the Southeast corner of said Lot One (1), thence in an easterly direction along the North line of land owned by the Joseph White Estate a distance of 4,000 feet more or less to the West bank of the Missouri River, thence in a northerly direction following the meanderings of the Missouri River to the Kansas-Nebraska State Line, thence West along said State line a distance of 6040 feet more or less to the place of beginning.

and that the plaintiff's title to said real estate is quieted against the defendants and that said defendants and all persons claiming by, through or under them are forever barred and excluded from any estate, interest or lien or claim upon the said estate and the cost of said action in the amount of $174.99 are taxed to the defendant, the State of Kansas.

Syllabus by the Court Affirming the District Court, Case No. 41,882, Supreme Court of Kansas—Exhibit 8

Filed Nov. 12, 1960

The record in an action to quiet title to certain land bordering the Missouri River to which the plaintiff claims title by accretion to her contiguous land, and the State of Kansas claims title to the same land as being formed as part of an island from the bed of a navigable stream, examined and it is *held:*

(1) There was substantial evidence to support the district court's findings and judgment that the land was formed by accretion and was not formed as an island;

(2) The appellant did not suffer substantial prejudice by the district court's refusal to make additional and modified findings of fact, and (3) the district court did not err in quieting plaintiff's title to all the land described in her petition.

Quit Claim Deed to Right of Way from C. B. & Q. R.R. Co.—Exhibit 14, Entry 27

Acknowledged Jan. 29, 1934, before A. D. McLane, Notary Public, Cook County, Illinois. Commission expires Mar. 22, 1935. Corporate and notarial seals affixed. One witness. Quit claims "any right, title or interest that may remain vested in the C. B. & Q. R. R., along the line of it's railroad reserved Rec. 1933, extending northerly from the Kansas-Nebraska state line, which is the south line of T. 1 N., R. 18 to the North Line of Sec. 29, T. 1 N., R. 18 E., through Sec. 36 etc.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

ENGINEERING DEPARTMENT

Lincoln, Nebraska
July 15, 1963

File 1830

Mr. Simon Lantzy
Attorney at Law
Box 175
Falls City, Nebraska

Dear Sir:

Referring to your letter of July 13 in regard to our right of way sheet No. 46390; we cannot find anything definite, but we believe this sheet was drawn about 1912.

Attached are prints of our drawings Nos. 26047 and 28415 which were drawn in 1895. These may be of some value to you.

Very truly yours,

R. W. SCOTT

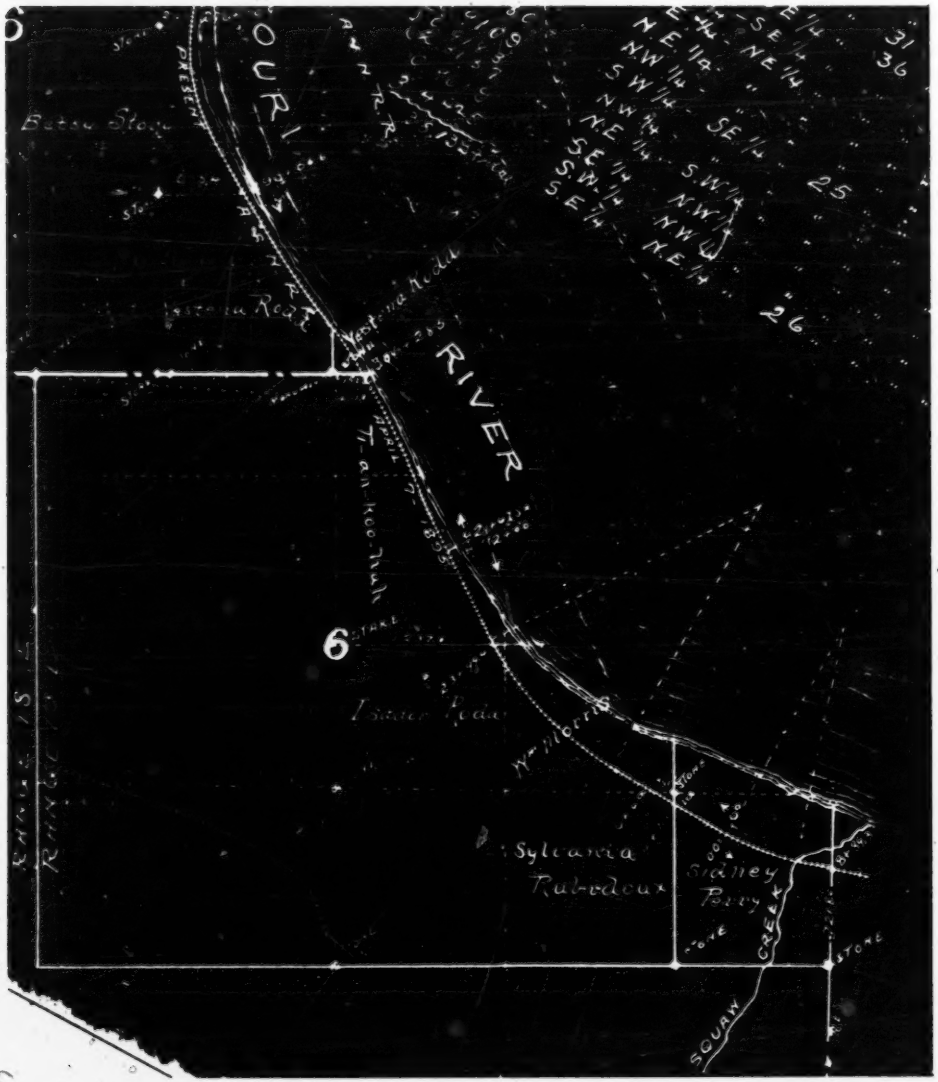
By A. J. Strobel

incl.

Plff's Ex. No. 20
THOMAS E. DUNBAR
COURT REPORTER

Appendix

Map of Atchison & Nebraska R.R. through Iowa Indian Reservation—Exhibit 20



LENGTH of R.R. THROUGH 40 ACRE TRACTS WHERE A. & N. R.R. HAS BEEN CHANGED

3.1228	Acres =	SW¼ – SW¼	Sec.	5	T. 15	R 19 E	1360.3 Ft	Sidney Perry
0.4086	"	SE¼ – SE¼	"	6	"	"	178.0 "	Sylvania Rubidoux
3.6166	"	N.E¼	"	"	"	"	1575.4 "	Wm Morris
0.4017	"	NW¼	"	"	"	"	175.0 "	Isadore Rodd
5.3710	"	W½ NE¼	"	"	"	"	23396 "	Juan-Ree Rale
0.9183	"	S.W¼ SW¼	"	31	" 1 N.	"	400.0 "	Vestena Rodd
2.6903	"	S.E¼ SE¼	"	36	" "	" 18 E	1171.9 "	Vestena Rodd
3.2730	"	N.E¼ – SE¼	"	"	" "	"	1425.7 "	Betsy Story
3.0581	"	SE¼ – NE¼	"	"	" "	"	1332.1 "	Jennie Rubidoux
2.3292	"	N.E¼	"	"	" "	"	1014.6 "	Lucy Cambell
0.6885	"	NW¼	"	"	" "	"	300.0 "	Lucy Cambell
3.7080	"	SW¼ – SE¼	"	25	" "	"	16152 "	Sam Willson
0.9109	"	NW¼	"	"	" "	"	396.8 "	John Story
0.9183	"	N.E¼ – S.W¼	"	"	" "	"	1407.4	Sam Willson (Lou) Mah-Cum Mee Husband Wife
2.3157	"							
0.9619	"	SE¼ N.W¼	"	"	" "	"	419.0 "	John Story
3.4425	"	S.W¼ N.W¼	"	"	" "	"	1500.0 "	Stephen Story
35.1339	Total	S.E¼ – N.E¼	"	26	" "	"	1274.0 "	Stephen Story

Appendix

Right of Way of C. B. & Q. R.R. Co.—Exhibit 21

This Instrument is to evidence by the signature of the persons signing and acknowledging the same the receipt from the Atchinson & Nebraska Railroad Com pany and the Chicago Burlington & Quincy Railroad Company its lessee in perpetuity, by the undersigned as allottees, or heirs, parents or guardians of deceased or minor allottees, of the allotments below described of the amount below stated on account of right of way one hundred feet wide, fifty feet on each side of the center of the track of Atchinson & Nebraska Railroad as located on and since the 7th day of April 1895 over and through such allotments in pursuance of the terms of an "Act of Congress" entitled "An Act Granting to the Atchinson & Nebraska Railroad Company and the Chicago, Burlington & Quincy Railroad Company its lessee in perpetuity the right of way over a part of the Sac and Fox and Iowa Indian Reservation in the States of Kansas and Nebraska" the said allotments the amount of land taken for right of way over each, and the amount paid on account of each allotment being as follows

Names of Allottee	Sub-division	Sec	Town	Range	Acres	Amount Received
Jennie Rubidoux	SE¼NE¼	36	1N	18E	3.1	77.50
Lucy Campbell	NE¼NE¼	36	1N	18E	2.3	57.50
" "	NW¼NE¼	36	1N	18E	0.7	17.50
Sam Wilson	SW¼SE¼	25	1N	18E	3.7	92.50
Sam Wilson	S½NE¼SW¼	25	1N	18E	0.9	22.50
John Story	NW¼SE¼	25	1N	18E	0.9	22.50
John Story	SE¼NW¼	25	1N	18E	1.0	25.00
Mah-Cum-Mee	N½NE¼SW¼	25	1N	18E	2.3	57.50

And all said land being situated in Richardson County, Nebraska and such sums received being in full of any and all claims against said railroad companies on account of lands taken for right of way.

Office-Supreme Court, U.S.
FILED
MAR 1 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1019

ALMA M. GREEN and HARRY GREEN,
Petitioners,

vs.

OSGOOD-LEWIS-PERKINS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES R. HOOVER
4140 West 71st
Prairie Village, Kansas
Counsel for Respondent

Of Counsel

WILTSE, WILTSE & LANTZY
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Falls City, Nebraska

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Prairie Village, Kansas

COX & ANDERSON
6025 Martway
Mission, Kansas

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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B.

JURISDICTIONAL QUESTIONS

Petitioners attempt to establish jurisdiction for a Writ of Certiorari by asserting that certain questions involving Federal Statutes were presented to and erroneously decided by the trial court and The Supreme Court of Nebraska.

However, Petitioners have departed so far from the form and requirements prescribed by *Rule 23, Revised Rules of The Supreme Court,* in failing to state concisely the manner in which Petitioners contend that the lower courts have been presented with a Federal Question, or when or how either court decided said question, that Respondent is unable to make a concise reply.

Rule 23, Revised Rules of the Supreme Court.

> "4. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

In *Southern Power Co.* v. *North Carolina Public Service Co. et al.,* 263 U.S. 508, 44 S. Ct. 164 [1924], the Court *held:*

> "A petition to the United States Supreme Court for a Writ of Certiorari should make a clear, definite and complete disclosure concerning the controversy, since it is impossible for the Court critically to examine the record before ruling on the application, and it must rely largely on preliminary papers."

From a review of Petitioners' Brief as a whole, it would appear the Petitioners' contention is that the trial court

and The Supreme Court of Nebraska *by inference* necessarily considered and decided the Case upon the interpretation of various sections of Title 43 and Title 28, U.S.C.A.

Petitioners, however, fail to set forth in their Petition when or in what manner these questions were first raised in the trial court, or in the "Assignments of Error" to the Appellate Court, or the way in which said court passed upon any of same.

In *Southwestern Bell Telephone Co.* v. *State of Oklahoma et al.*, 303 U.S. 206, 58 S. Ct. 528 [1938], in ¶[3], the Court *held:*

> [3] "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

It is submitted that only one of the Federal Questions, which Petitioners now assert, to wit: §772 of Title 43, U.S.C.A., further discussed on page 5, was ever raised other than in their present Petition, and that was in their "Brief in Support of Motion for Rehearing and for Stay of Issuance of Mandate for Purpose of Prosecuting Proceedings to United States Supreme Court on Petition for Writ of Certiorari". (Appendix, page A4.) The complete "Brief" has been certified to the Court, as a part of the record, by Petitioners.

C.

There were no Federal Statutes, Treaties or Regulations cited or presented to the trial court, or considered by The Supreme Court of Nebraska.

If certiorari were granted, the only question which this Court would consider on the merits, under its rules. would be the question of ownership of Nebraska real estate as between Petitioners and Respondent, all of whom are residents of the State of Kansas.

E.

STATEMENT OF THE CASE BEFORE THIS COURT

Petitioners now seek to have the decision of The District Court of Richardson County, Nebraska, and the affirming opinion of The Supreme Court of Nebraska. determining the ownership of real estate, admittedly located in Richardson County, Nebraska, reviewed by this Court on the basic grounds that the lower courts did not properly apportion the accretion land in question.

F.

ARGUMENT IN OPPOSITION TO JURISDICTION FOR WRIT OF CERTIORARI

I

"The Amended Answer and Cross-Petition" filed by Petitioners in the District Court of Richardson County, Nebraska, failed to disclose to the trial court any Federal Questions. No reference was made to any of the Federal Statutes which Petitioners now assert were erroneously considered by the lower courts. (Tr. pp. 7-13.)

Petitioners fail to set forth in their "Petition for Writ of Certiorari" where in the trial of the case any federal constitutional provisions, treaties, statutes, ordinances or regulations were presented to, or considered by, the lower courts.

Petitioners in their "Brief on Appeal to The Supreme Court of Nebraska" did not include in their "ASSIGNMENTS OF ERROR RELIED UPON FOR REVERSAL", any federal constitutional provisions or statutes, or make claim that the trial court considered or applied such erroneously or otherwise. (Appendix, page A1.) The complete "Brief" has been certified to the Court, as a part of the record, by Petitioners.

Under the Rules of The Supreme Court of Nebraska, the court, in the consideration of the cause, will not consider any error not assigned or argued. *Revised Rules of The Supreme Court of The State of Nebraska, 8a2.(3).* (Appendix, page A1.)

> "Supreme Court on Appeal has no duty to search to ascertain if there is error in record, and every reasonable presumption will be indulged in favor of correctness of any ruling of the trial court, and any ruling alleged to be erroneous must be specifically pointed out to be reviewed." *Wieck* v. *Blessin,* 165 Neb. 282, 85 N.W. 2d 628 [1957].

One of the Federal Statutes which Petitioners now attempt to pose as a basis for a Writ of Certiorari *was first mentioned or cited* to The Supreme Court of Nebraska *after it had rendered its decision* for Respondent on June 11, 1965.

This one, §772 of Title 43, U.S.C.A., was first cited to the lower court in Petitioners' "Brief in Support of Motion for a Rehearing and for Stay of Issuance of Mandate for Purpose of Prosecuting Proceedings to United States Supreme Court on Petition for Writ of Certiorari" before The Supreme Court of Nebraska, filed August 12, 1965. (*Excerpt* appearing in Appendix, page A4.)

Petitioners claim "erroneous" *interpretation by inference*—and specify nothing.

§913 of Title 43, and the sections of Title 28 U.S.C.A., upon which Petitioners now rely, were *never cited to, or raised in,* said appellate court *by any means whatsoever.*

> "This Court is a Court of Review, and it will not consider questions not raised or disclosed by the record brought to it for review which were not considered by the Courts below." *Edward Hines Yellow Pine Trustees* v. *Martin et al.,* 268 U.S. 458, 45 S. Ct. 543 [1925].

II

Even though no Federal Questions were presented to the lower courts, had the claimed issues been properly raised and preserved they would in no way have altered or affected the substantive decisions of said courts.

1. Title 43 of the United States Code deals exclusively with "Public Lands", and by the title's own definition (43 U.S.C.A. §1361), does not pertain to this land, nor to any land which is not Federal land that is under The Bureau of Land Management. (Appendix, page A4.)

2. Petitioners rely upon Title 28 U.S.C.A. §1738, arguing that The Supreme Court of Nebraska did not give "full faith and credit" to the decision of the District Court of Doniphan County, Kansas, and The Supreme Court of Kansas, in the case of *Green* v. *Ector et al.,* 187 Kan. 240, 356 P.2d 664 [1960].

Petitioners did not present the question of full faith and credit to The Supreme Court of Nebraska, but insisted that the Kansas decision was *"res judicata* and *stare decisis"* to the rights of the parties.

The Kansas Court did not attempt to resolve the title to any Nebraska land, and the Nebraska Court did not attempt to determine the title to any Kansas land.

The question of the proper method of apportionment of accretion land was not considered by the Kansas court, and The Supreme Court of Nebraska, partly for that reason, held that the Kansas decision was not controlling.

The Kansas Court *quieted title to certain lands in Kansas* in Plaintiff Green, now one of the Petitioners in this Court, *and nothing more.*

The Supreme Court of Nebraska held in this regard, in *Osgood-Lewis-Perkins, Inc.* v. *Green et al.*, 178 Neb. 807, 135 N.W. 2d 718 [the case which is the subject of Petitioners' Petition]:

> "Defendants also rely upon principles of res judicata. *Green* v. *Ector,* 187 Kan. 240, 356 P. 2d 664, is said to be decisive of Alma's right to accretion.
>
> In the pleadings, the findings of fact, the conclusions of law, and the judgment we discover no suggestion that title to accretion in Kansas was quieted in Alma on the basis of accretion in Nebraska. The contestants were Alma and the State of Kansas. By stipulation Alma was to prevail unless the land was an island.
>
> Nothing in that case affects any right in this case. If a question of fact was neither directly nor indirectly in issue in a former action, a judgment in the former action clearly is not conclusive of the question in a subsequent suit on a different cause of action. See *Boomer* v. *Olsen,* 143 Neb. 570, 10 N.W. 2d 507."

The trial court and The Supreme Court of Nebraska both found from the evidence presented, that title to the Nebraska real estate was in Respondent.

III

The substantive question decided was simply a question of the ownership of Nebraska real estate, which, in the absence of diversity, is a question over which the courts of the State of Nebraska have exclusive jurisdiction.

Furthermore, in the absence of a violation of a person's constitutional rights, federal courts lack the authority and power to review such State Court decisions determining title to non-public lands located in the several states.

CONCLUSION

Petitioners have failed to establish in their Petition for a Writ of Certiorari that any Federal Question was ever presented to the trial court, or timely presented to and ruled upon by The Supreme Court of Nebraska, or that a Federal Question of substance was decided in a manner that was probably not in accord with the decisions of this Court; and accordingly a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES R. HOOVER
4140 West 71st
Prairie Village, Kansas 66208
Counsel for Respondent

Of Counsel
WILTSE, WILTSE & LANTZY
Richardson County Bank Building
Falls City, Nebraska
G. M. OSGOOD
4140 West 71st
Prairie Village, Kansas
COX & ANDERSON
6025 Martway
Mission, Kansas

PROOF OF SERVICE

I, James R. Hoover, the attorney of record for Osgood-Lewis-Perkins, Inc., Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1966, I served three copies of the foregoing "Brief for Respondent in Opposition", on Petitioners, by depositing the same in the United States Postoffice in Prairie Village, Kansas, duly addressed to William L. Walker, 636 Stuart Building, Lincoln, Nebraska, one of the attorneys of record for the Petitioners, with first class mail postage paid.

.....

JAMES R. HOOVER
4140 West 71st
Prairie Village, Kansas 66208

APPENDIX

REVISED RULES OF THE SUPREME COURT OF NEBRASKA 1963

* * *

8. Briefs, Preparation.

a. 2

* * *

(3) ASSIGNMENTS OF ERROR. Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned.

ASSIGNMENT OF ERRORS APPEARING IN PETITIONERS' APPEAL BRIEF IN THE SUPREME COURT OF NEBRASKA, appearing on page 10 thereof:

ASSIGNMENTS OF ERROR RELIED UPON FOR REVERSAL

The court erred in finding and ordering as follows:

1. That appellants failed to establish by evidence that it would be equitable to allocate the accretion lands by the proportionate method to appellant Alma M. Green.

2. That the evidence showed that doing equity required that all accretion land in question must be allocated by extending the Kansas-Nebraska state line and existing sectional lines eastward to the Missouri River and attaching the accretion land as now formed to the Nebraska riparian owner as determined by extended lines to appellee in fee simple.

3. In quieting title to said accretion land described in (E51:40, 601) and (E52:40, 628) by metes and bounds containing about 212.5 acres in fee simple in appellee.

4. That C. B. & Q. RR. Co. was not a riparian owner and the accretion thereto was not riparian, but such accretion was riparian to land of appellee and its predecessors in title and conveyance of the right of way of C.B.&Q. RR. Co. did not convey riparian rights to Richardson County, Nebraska.

5. That appellant Alma M. Green did not establish title to her Kansas accretion land by judgment and decree in the case in the District Court of Doniphan County, Kansas entitled *Alma M. Green* v. *John T. Ector et al.*, Case No. 8968, by using the proportionate method of allocating accretion land.

6. That said judgment and decree in said Kansas case entered in favor of appellant Alma M. Green against the State of Kansas and William F. Perkins and Catherine O. Perkins was neither res judicata nor stare decisis against appellee.

7. That appellants Green failed by a preponderance of evidence to establish title by adverse possession to any part of the Nebraska accretion land.

8. That said judgment and decree entered by the court was against the weight of the evidence, and a preponderance of the evidence does not support such judgment and decree and some are contrary to the evidence; but preponderates in favor of a judgment and decree for appellant in the granting of appellants cross petition and in voiding judgment and entering judgment and decree for appellant.

9. That said judgment and decree entered by the court are contrary to the law and such judgment and decree for

appellant quieting her title in fee simple in said disputed land on her cross-petition would not have been contrary to law.

10. That the evidence does not support a judgment and decree in favor of appellee to any lands by extending the Kansas-Nebraska state line and existing sectional lines east to the thread of the Missouri River to any land described as N½ S½ of Section 31 and N½ S½ of Section 32, Township 1 North, Range 19 East of 6th P. M., Richardson County, Nebraska; because appellee actually disclaimed any interest in said above described land.

11. The land of appellee described as Lot 1, Section 31-1-19, was not riparian and could not have had attached to it accretion land as contended by appellee and found and ordered by the court.

12. The court erred in admitting into evidence over objection of appellants the following exhibits: (E3:13, 1395), (E5:13, 1395), (E26:16, 31), (E28:16, 1398), (E30:16, 1399) and (E31:16, 1400).

13. The court erred in sustaining objections to (E59: 508, 1405) and excluding same from evidence.

14. The court did not abuse its discretion and err in excluding the offered amendments of appellee to its amended petition to allege damages prior to institution of this action which was not requested until all evidence had been admitted and all parties rested and the court had stated he was ready to announce the decision in the action.

15. The court erred in granting a temporary restraining order and temporary injunction during pendency of the action wherein possession of the disputed land was given to appellee and a permanent injunction against appellants excluding them from the land in dispute.

16. The court erred in taxing the costs in the action to appellants.

17. The court erred in entering a judgment for $27.00 as damages for wheat crop raised by appellants on disputed land in 1963.

EXCERPT FROM PETITIONERS' ARGUMENT IN THEIR **"BRIEF IN SUPPORT OF MOTION FOR A REHEARING AND FOR STAY OF ISSUANCE OF MANDATE FOR PURPOSE OF PROSECUTING PROCEEDINGS TO UNITED STATES SUPREME COURT ON PETITION FOR WRIT OF CERTIORARI" on page 31 thereof, filed August 12, 1965.**

* * *

E. THE COURT ERRED IN ITS DECISION ON FEDERAL QUESTIONS INVOLVED.

(1) The court erred in its *interpretation by inference* [italics supplied] of Sections [sic] 43 U.S.C.A., Sections 751, 752, 770, 772, and 773, providing for surveys by General Land Office as to whether original survey or resurvey shall control the established meander line from which a surveyor must start his survey for purpose of apportioning accretion land among riparian owners.

TITLE 43, U.S.C.A., §1361

§1361. DEFINITION OF "PUBLIC LANDS"

For the purposes of this chapter the term "public lands" means all Federal lands administered by the Bureau of Land Management. Pub. L. 86-649, § 2, July 14, 1960, 74 Stat. 506. [Italics Supplied.]